(RZx), CLOSED, DISCOVERY, RELATED-G, TRANSFERRED

- 07-793

### UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA (Southern Division - Santa Ana) CIVIL DOCKET FOR CASE #: 8:07-cv-00829-AHS-RZ

Chriss Street v. Daniel Harrow et al Assigned to: Judge Alicemarie H. Stotler Referred to: Magistrate Judge Ralph Zarefsky Related Case: 8:06-cv-00425-AHS-RZ

Case in other court: Superior Court of California County of

Orange, 07CC07845

Cause: 28:1441 Notice of Removal - Contract Default

Date Filed: 07/19/2007 Date Terminated: 11/28/2007 Jury Demand: None

Nature of Suit: 190 Contract: Other Jurisdiction: Federal Question

**Plaintiff** 

**Chriss Street** 

represented by Phillip B Greer

Law Offices of Phillip B. Greer 1280 Bison Road B9-531 Newport Beach, CA 92660 949-640-8911 LEAD ATTORNEY ATTORNEY TO BE NOTICED

V.

Defendant

**Daniel Harrow** 

I hereby attest and certify on 12-3-01 that the foregoing document is a full, true and correct copy of the original on file in my office, and in my legal custody.

CLERK U.S. DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DEPUTY CLERK



represented by **Bradley D Blakeley** 

Blakeley & Blakeley LLP 1000 Quail Street, Suite 200 Newport beach, CA 92660 949-260-0611 LEAD ATTORNEY ATTORNEY TO BE NOTICED

Robert T Kugler

Leonard Street and Deinard 150 South Fifth Street, Suite 2300 Minneapolis, MN 55402 612-335-1645 Email: robert.kugler@leonard.com LEAD ATTORNEY ATTORNEY TO BE NOTICED

Scott E Blakeley

Blakeley & Blakeley LLP 1000 Quail Street, Suite 200 Newport Beach, CA 92660 949-260-0611 Email: seb@bandblaw.com

### LEAD ATTORNEY ATTORNEY TO BE NOTICED

### **Defendant**

### DOES

1 through 25, inclusive

Date Filed	#	Docket Text		
07/19/2007	1	NOTICE OF REMOVAL from Superior Court of California County of Orange Central Justice Center, case number 07CC07845 with conformed copy of summons and complaint. Case assigned to Judge James V. Selna, discovery to Magistrate Judge Arthur Nakazato. (Filing fee \$ 350 due), filed by defendant Daniel Harrow.(rla) (Entered: 07/30/2007)		
07/19/2007		FAX number for Attorneys Bradley D Blakeley, Scott E Blakeley is 949-260-0613. (rla) (Entered: 07/30/2007)		
07/19/2007	2	CERTIFICATION AND NOTICE of Interested Parties filed by Defendant Daniel Harrow. (rla) (Entered: 07/30/2007)		
07/23/2007	3	NOTICE of Assignment to United States Magistrate Judge for Discovery filed by defendant Daniel Harrow. (esa) (Entered: 07/30/2007)		
08/01/2007	4	ANSWER to Complaint filed by defendant Daniel Harrow.(esa) (Entered: 08/08/2007)		
08/03/2007	5	NOTICE OF MOTION AND MOTION to Remand Case to State Counfiled by plaintiff Chriss Street.Motion set for hearing on 9/10/2007 at 01:30 PM before Judge James V. Selna. (esa) (Entered: 08/09/2007)		
08/03/2007	6	MEMORANDUM of Points and Authorities in support of MOTION to Remand Case to State Court[5] filed by Plaintiff Chriss Street. (esa) (Entered: 08/09/2007)		
08/03/2007	7	PROOF OF SERVICE filed by plaintiff Chriss Street. Notice of Motio and Motion to Remand; Points and Authorities served on 8/2/07. (esa) (Entered: 08/09/2007)		
08/07/2007	8	PROOF OF SERVICE filed by defendant Daniel Harrow. Notice of Motion and Motion to Transfer Venue; Memorandum of Points and Authorities; etc. were served on 8/6/07. (esa) (Entered: 08/14/2007)		
08/07/2007	9	9 NOTICE OF MOTION AND MOTION to Transfer Case to District o Delaware filed by defendant Daniel Harrow.Motion set for hearing on 8/27/2007 at 01:30 PM before Judge James V. Selna. (esa) (Entered: 08/14/2007)		
08/07/2007	10	MEMORANDUM of Points and Authorities in support of MOTION to Transfer Case to District of Delaware [9] filed by Defendant Daniel Harrow. (esa) (Entered: 08/14/2007)		
08/07/2007	11	DECLARATION of Jacob B Sellers in support of MOTION to Transfer Case to District of Delaware[9] filed by Defendant Daniel Harrow. (esa) (Entered: 08/14/2007)		

08/15/2007	12.	ORDER RE TRANSFER PURSUANT TO GENERAL ORDER 07.02 - Related Case- filed. Related Case No: SACV06-0425 AHS (RZx). Case transfered from Judge Arthur Nakazato and James V. Selna to Judge Alicemarie H. Stotler and Ralph Zarefsky for all further proceedings. The case number will now reflect the initials of the transferee Judge SACV07-829 AHS (RZx). Signed by Judge Alicemarie H. Stotler (smi) (Entered: 08/15/2007)		
08/16/2007	19	APPLICATION of R T Kugler for Leave to Appear Pro Hac Vice. FEE PAID. filed by defendant Daniel Harrow. Lodged order. (dmjr) (Entered: 08/24/2007)		
08/21/2007	20	ORDER by JudgeJames V Selna, granting APPLICATION of R T Kugler for Leave to Appear Pro Hac Vice. FEE PAID.[19] (dmjr) (Entered: 08/24/2007)		
08/22/2007	13.	ORDER TO PARTIES Requiring Rule 26 (f) Report by Judge Alicemarie H. Stotler: IT IS ORDERED, that all parties and counsel shal meet their obligations to disclose information, confer on a discovery plan and file a report to the Court, as required by FRCP 26(f). Rule 26 Meeting Report due no later than 11/5/2007. Failure to comply with this Order may result in the imposition of sanctions. IT IS FURTHER ORDERED that all counsel and parties appearing pro se must be familiar with the FRCP and Local Rules of the Central District of California. IT IS SO ORDERED.(rla) (Entered: 08/22/2007)		
08/22/2007	14	MINUTES OF (IN CHAMBERS) ORDER by Judge Alicemarie H. Stotler: CONTINUING MOTION to Transfer Venue [9]. This matter has been transferred for all further proceedings, pursuant to General Order 07-02, from Hon. James V. Selna, to the calendar of Chief Judge Alicemarie H. Stotler, Santa Ana Courthouse, Courtroom 10A, 411 West Fourth Street, Santa Ana, California. On the Court's own motion, Motion to Transfer Venue is continued to 9/24/07, at 10:00 a.m.(rla) (Entered: 08/22/2007)		
08/22/2007	15	NOTICE OF FILING REPORT AND RECOMMENDATION by Magistrate Judge Marc L. Goldman and Lodging of Proposed Judgment and Order.Objections to R&R due by 9/11/2007(dmjr) (Entered: 08/23/2007)		
08/22/2007	16	NOTICE OF CLERICAL ERROR: Due to clerical error Re: Notice of Report and Recommendation[15] should have been docketed on another case (dmjr) (Entered: 08/23/2007)		
08/22/2007	17	NOTICE OF FILING REPORT AND RECOMMENDATION by Magistrate Judge Marc L. Goldman Objections to R&R due by 9/11/2 (dmjr) (Entered: 08/23/2007)		
08/24/2007	18	NOTICE OF CLERICAL ERROR: Due to clerical error Re: Notice of Report and Recommendation[17] should have been filed on another case (dmjr) (Entered: 08/24/2007)		
08/27/2007	22	DECLARATION of SARAH E. DOERR IN OPPOSITION TO		

08/27/2007	23	DEFENDANT DANIEL HARROW'S MEMORANDUM of LAW IN OPPOSITION TO PLAINTIFF'S MOTION TO REMAND filed by DEFENDANT Daniel Harrow. (sd) (Entered: 09/07/2007)	
08/28/2007	21	MINUTES OF IN CHAMBERS ORDER held before Judge Alicemarie H. Stotler: re: MOTION to Remand Case to State Court[5]. Motion reset for hearing on 9/24/2007 at 10:00 AM before Judge Alicemarie H. Stotler.(dmjr) (Entered: 08/29/2007)	
09/18/2007	24	MINUTES OF IN CHAMBERS ORDER held before Judge Alicemarie H. Stotler: Court finds Plaintiffs MOTION to Remand Case to State Court[5] and Defendants MOTION to Transfer Case to District of Delaware[9] appropriate for submission on papers without oral argument. Matter is removed from Courts 09/24/07 calendar.(In) (Entered: 09/20/2007)	
10/31/2007		MINUTES OF IN CHAMBERS ORDER before Judge Alicemarie H. Stotler: In light of pending motions, the Court orders the deadline for filing of the Rule 26(f) Report continued from November 5, 2007 to December 10, 2007. (em) (Entered: 10/31/2007)	
10/31/2007	25	MINUTES OF IN CHAMBERS ORDER before Judge Alicemarie H. Stotler: In light of pending motions, the Court orders the deadline for filing of the Rule 26(f) Report continued from 11/5/07 to 12/10/2007. (em) (Entered: 11/01/2007)	
11/28/2007	<u>26</u>	ORDER by Judge Alicemarie H. Stotler transferring case to UNITED STATES DISTRICT COURT for the DISTRICT OF DELAWARE. Order granting Defendant's Motion to Transfer Venue [9] and Denying Plaintiff's Motion to Remand [5]. Original file, certified copy of the transfer order and docket sheet sent. (MD JS-6. Case Terminated ) (rla) (Entered: 12/03/2007)	
12/03/2007		TRANSMITTAL of documents to Delaware District Court. (rla) (Entered: 12/03/2007)	

PACER Service Center					
	Transaction Receipt				
	12/03/2007 10:21:19				
PACER Login:	us3877	Client Code:			
Description:	Docket Report	Search Criteria:	8:07-cv-00829-AHS- RZ		
Billable Pages:	3	Cost:	0.24		

,	Case 1:07-cv-00793-SLR	Document 26-2	Filed 12/06/2007	Page 1 of 2
	•			
1	Scott E. Blakeley (State Bar No. 1	41418)		
2	E-Mail: seb@bandblaw.com Bradley D. Blakeley (State Bar No		2007 JUL	19 PM 12: 25
3	BLAKELEY & BLAKELEY LLI 1000 Quail Street, Suite 200		CEFRK U.S GENTRA	. DISTRICT COURT . DIST. OF CALIF. HTA ANA
4 5	Newport Beach, CA 92660 Telephone: (949) 260-0611 Facsimile: (949) 260-0613		84_ <b>SV</b>	NTA ANA
6 7	Attorneys for Defendant, Daniel Harrow			
8	UN	IITED STATES DIS	TRICT COURT	
9	CEN	TRAL DISTRICT (	OF CALIFORNIA	
10		SOUTHERN D		<b></b>
11	CHRISS STREET,		CASE NO	07-829JVS (ANx)
12 13	Plaintiff, v.	I A	NOTICE OF REACTION TO FE	MOVAL OF CIVIL DERAL COURT
14 15	DANIEL HARROW, DOES 1 thr inclusive,	rough 25,		
16 17	Defendants	-		
18 19 20	TO THE CLERK OF THE PLAINTIFF, CHRISS STR PLEASE TAKE NOT	REET, AND HIS	COUNSEL OF	RECORD HEREIN:
21	hereby removes to this Court			
22	1			the Superior Court for
23				entitled <u>Chriss Street v.</u>
24	<u>Daniel Harrow,</u> as Cas	e Number 07-CC	-07845 ("Action"	<b>(</b> ).
26	2. The comp	plaint and summo	ons were served u	pon the Defendant. A
27	true and correct copy o	of said complaint	is attached hereto	as Exhibit A.  DOCKETED ON CM
28	NOTICE OF RE	MOVAL OF CIVIL A	CTION TO FEDERAL	COURT
	Ntc of Removal v2.1	ORIGI	NAL	JUL 9 0 2007

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- 3. The Action is a civil action of which this Court has original jurisdiction under 28 U.S.C. § 1441(b) in that it is arises under 28 U.S.C. § 1334(b) and 28 U.S.C. § 1452(a) and is related to U.S. Bankruptcy Court (Dist. Delaware) Case No. 96-1563 (PJW).
- 4. Plaintiff, Chriss Street, and Defendant in the Action are, respectively, the former and present Trustee of the End of the Road Trust, which "is a liquidating trust established under the laws of Delaware, pursuant to a plan of reorganization." Exh. A (Complaint ¶¶ 1-4, 7-10). The allegations asserted in this Action arise out of and relate to U.S. Bankruptcy Court (Dist. Delaware) Case No. 96-1563 (PJW).1
- After removal, Defendant will promptly move to transfer the 5. Action to U.S. Bankruptcy Court (Dist. Delaware) Case No. 96-1563 (PJW). Defendant is also concurrently filing a copy of this notice with the Superior Court for the State of California in and for the County of Orange where the Action is pending.
  - 6. The Action is a core bankruptcy proceeding.
- 7. Defendant consents to entry of final orders or judgment by U.S. Bankruptcy Court (Dist. Delaware) Case No. 96-1563 (PJW).

Dated: July/\(\sum\_{\chi}\), 2007

BLAKELEY & BLAKELEY LLP

Bradley D. Blakeley

Attorneys for Defendant,

Daniel Harrow

<sup>&</sup>lt;sup>1</sup> This is the second suit involving the same parties, but different facts. The first action filed by plaintiff, Chriss Street, was removed from State Court on April 28, 2006, to the Central District of California, Southern Division, Honorable Alicemarie H. Stotler presiding. On May 22, 2006, defendant Daniel Harrow, filed a motion to transfer venue to the Federal Court in the District of Delaware. On July 27, 2006, Chriss Street dismissed the complaint against Daniel Harrow.

SUM-100

### SUMMONS (CITACION JUDICIAL)

NOTICE TO DEFENDANT:
(AVISO AL DEMANDADO):
DANIEL HARROW, DOES 1 thru 25, inclusive

YOU ARE BEING SUED BY PLAINTIFF: (LO ESTÁ DEMANDANDO EL DEMANDANTE): CHRISS STREET FOR COURT USE ONLY (SOLO PARA USO DE LA CORTE)

SUPERIOR COURT OF CALIFORNIA COUNTY OF ORANGE CENTRAL JUSTICE CENTER

JUL 12 2007

ALAN SLATER, Clerk of the Court

Y: J. TRAN DEPUTY

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an

There are other legal requirements. You may want to call an attorney right away, if you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site (www.lawhelpcalifornia.org), the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), or by contacting your local court or county bar association.

Tiene 30 DÍAS DE CALENDARIO después de que le entreguen esta citación y papeles legales para presentar una respuesta por escrito en esta corte y hacer que se entregue una copia al demandante. Una carta o una llamada telefónica no lo protegen. Su respuesta por escrito tiene que estar en formato legal correcto si desea que procesen su caso en la corte. Es posible que haya un formulario que usted pueda usar para su respuesta. Puede encontrar estos formularios de la corte y más información en el Centro de Ayuda de las Cortes de California (www.courtinfo.ca.gov/seifhelp/espanol/), en la biblioteca de leyes de su condado o en la corte que le quede más cerca. Si no puede pagar la cuota de presentación, pida al secretario de la corte que le dé un formulario de exención de pago de cuotas. Si no presenta su respuesta a tiempo, puede perder el caso por incumplimiento y la corte le podrá quitar su sueldo, dinero y blenes sin más advertencia.

Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumpla con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services, (www.lawhelpcalifornia.org), en el Centro de Ayuda de las Cortes de California, (www.courtinfo.ca.gov/selfhelp/espanol/) o poniéndose en contacto con la corte o el colegio de abogados locales.

The name and address of the court is: (El nombre y dirección de la corte es): Orange County Superior Court ORANGE COUNTY SUPERIOR COURT UNLIGHTED JURISDICTION - CIVIL 769 CIVIC CENTER DR. WEST P. O. BOX 838 SANTA ANA, CA 92702-083

CASE NUMBER: (Nomero del Caso) 107CC 078 45

JUDGE WILLIAM M. MONROE DEPT. C11

The name, address, and telephone number of plaintiffs attorney, or plaintiff without an attorney, is:

(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):

Phillip B. Greer, Esq. 1280 Bison Road B9-531 Newport Beach, California 92660 (949) 640-8911

DATE:	ALAN SLATER	JOSE	PH TRAN	, Deputy
(Fecha)		(Secretario)		(Adjunto)
	ummoris, use Proof of Service of Su esta citatión use el formulario Proof c	of Service of Summons, (POS-	010)).	
[SEAL]	NOTICE TO THE PERSON SET  1.  as an individual defend 2.  as the person sued und 3.  on behalf of (specify):		(N):	
	under: CCP 416.10 (c	lefunct corporation) ssociation or partnership)	CCP 416.60 (minor) CCP 416.70 (conservatee) CCP 416.90 (authorized pr	erson)
Form Adopted for Mandafory Use			Code of Cod Consultan	Page 1 of 1

Form Adopted for Mandatory Use Judicial Council of California SUM-100 [Rev. January 1, 2004]

SUMMONS

Code of Civil Procedure §§ 412.20, 485

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PHILLIP B. GREER SUPERIOR COURT OF CALIFORNIA COUNTY OF ORANGE CENTRAL JUSTICE CENTER AW OFFICES OF PHILLIP B. GREER 1280 Bison Road B9-531 JUL 12 2007 Newport Beach, California 92660 ALAN SLATER, Clerk of the Court (949) 640-8911 (949) 759-7687 BY: LIBAN DEPUTY 5 Attorney for Plaintiff 6 7 SUPERIOR COURT OF THE STATE OF CALIFORNIA 8 FOR THE COUNTY OF ORANGE 9 107CC07845 Case No.: 10 CHRISS STREET, Plaintiff, COMPLAINT FOR DAMAGES FOR 11 12 1. Breach of Contract VS. 2. Fraud 13 DANIEL HARROW and Does 1 thru 25 Intentional Interference with Economic Relations 14 inclusive, 4. Negligent Interference with **Economic Relations** 15 Defendant 5. Conspiracy 16 JUDGE WILLIAM M. MONROE 17 DEPT. C11 18 19 20 Plaintiffs allege: 21 1. Plaintiff, Chriss Street, is, and at all times mentioned herein was, a resident of 22 the County of Orange, State of California. 23 2. Defendant, Daniel Harrow, is, and at all times mentioned herein was, a 24 resident of the State of California. 25 **COMPLAINT FOR DAMAGES - 1** 

- 3. The true names and capacities of Defendant sued herein as Does 1 thru 25, inclusive, whether individual, corporate, associate or otherwise, are unknown to Plaintiffs at this time and, therefore, Plaintiffs sue said Defendants by such fictitious names. Plaintiff will amend this complaint to show the true names and capacities of said Defendants when same are ascertained. Plaintiff is informed and believes, and thereon alleges, that said Defendants, and each of them, are responsible in some manner for the acts and/or damages alleged herein.
- From approximately July 1996 to the end of August, 2005, Plaintiff served as the Trustee for the End of the Road Trust.
- 5. From approximately July 17, 2005 to July 17, 2006, Plaintiff was covered by a policy of Fiduciary Liability Insurance issued by Arch Specialty Insurance Company, policy No. FDC00090600. Pursuant to said policy, Plaintiff, as Trustee of End of the Road Trust, was entitled to coverage, including, but not limited to, a defense against liability for all actions taken as Trustee for the Trust.
- On or about August 19, 2005, Plaintiff, was served with a subpoena by the United States Department of Labor in his capacity as the Trustee of the End of the Road Trust.
- On or about August 19, 2006, Plaintiff, pursuant to his voluntary resignation
  as Trustee was replaced as Trustee of the End of the Road Trust by
  Defendant, Daniel Harrow.
- Pursuant to the terms and conditions of the policy of fiduciary liability
  insurance, Plaintiff tendered the defense of the United States Department of
  Labor subpoena to Defendant, Daniel Harrow for processing pursuant to his

duties as the new Trustee for the Trust. Subsequent to the tender of the defense of the Department of Labor subpoena to Mr. Harrow, Plaintiff was informed that there was no coverage and that Plaintiff would have to defend the subpoena personally. At the time Defendants, and each of them, informed Plaintiff of the denial of coverage by Arch, Plaintiff was unaware of what, if any, information had been provided to Arch and what, therefore, was the basis for the denial of coverage.

- 9. Plaintiff has defended, and continues to defend, the subpoena and subsequent actions of the United States Department of Labor as they relate to Plaintiff's tenure as Trustee of the End of the Road Trust without the assistance mandated by the policy of insurance.
- 10. On or about March, 2007, Plaintiff discovered, pursuant to a review of documents unearthed in responding to unrelated actions by the End of the Road Trust, correspondence dated April 13, 2006, from attorneys representing Arch Specialty Insurance Company to counsel for Defendant Harrow detailing the basis for the denial of a defense to Plaintiff in regard to the Department of Labor matter. Pursuant to the correspondence, a copy of which is attached hereto as Exhibit "A", certain responses provided by Mr. Harrow, in response to inquiries made by Arch to determine coverage, were "false when made." (Exhibit A, page Six, paragraph 1). The correspondence goes on to state that Mr. Harrow, as the Trustee, "may have made additional misrepresentations relating to the nature of the Trust's business." (Exhibit A, page Six, paragraph 2).

Filed 12/06/2007

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#### FIRST CAUSE OF ACTION

(Breach of Contract Against All Defendants)

- 11. Plaintiffs repeat and reallege each and every allegation in Paragraphs One thru Nine as if fully set forth herein.
- 12. Defendants, and each of them, knew that pursuant to the policy of insurance issued by Arch, both Arch and Defendants, and each of them, had a duty and obligation to provide a defense for Plaintiff against the Department of Labor subpoena. Furthermore, Defendants, and each of them, knew that Arch's coverage position would be dependent upon the information provided by Defendants, and each of them, as requested by Arch in making its coverage decision. Pursuant to the policy of fiduciary liability insurance issued by Arch, Defendants, and each of them, had a duty to provide accurate and truthful information to Arch.
- 13. Plaintiff has performed all conditions on his part to be performed pursuant to said agreement with the exception of those conditions whose nonperformance is excused by the conduct of Defendants, and each of them, as herein described and alleged.
- 14. Defendants, and each of them, breached said agreement by failing to provide all necessary and appropriate information in a truthful and accurate manner to Arch so as to allow Arch to conclude that it had a duty to provide a defense to Plaintiff in regard to the Department of Labor subpoena and subsequent related actions.
- 15.As a direct and proximate result of the breaches by Defendants, and each of them. Plaintiff was forced to provide, and continues to provide, a personal

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defense to the subpoena and related actions of the Department of Labor, all to his damage in an amount to be proven at the time of trial.

Filed 12/06/2007

#### SECOND CAUSE OF ACTION

(Fraud Against All Defendants)

- 16. Plaintiff repeats and realleges each and every allegation in Paragraph One thru Fifteen as if fully set forth herein.
- 17. As hereinabove described, Defendants, and each of them, represented to Plaintiff that they would provide a defense to each and every action taken by Plaintiff during his tenure as Trustee of the End of the Road Trust. Defendant and each of them, further represented to Plaintiff that they would provide Arch with honest and accurate information as to any and all claims made pursuant to said policy.
- 18. The representations made by Defendants, and each of them, were false and Defendants, and each of them, had no reasonable grounds for believing them to be true. The facts were that Defendants, and each of them, knew or should have known that they had not properly processed the application of Plaintiff. had not provided Arch with all necessary, appropriate, honest and accurate information so as to allow Arch to provide a defense and, in fact, provided Arch with false and misleading information as to the nature and extent of the claim.
- 19. At the time Defendants, and each of them, made the aforementioned representations, Plaintiff reasonably relied upon them and believed them to be true. In reliance upon those representations, Plaintiff did not immediately seek alternative means of defending against the subpoena and subsequent

actions of the Department of Labor subpoena. Had Plaintiff known the true facts, Plaintiff would not have relied upon the actions and representations of Defendants, and each of them, as herein described.

- 20. Plaintiff has been damaged as a result of the fraudulent misrepresentations of Defendants, and each of them, in that Plaintiff has had to incur considerable legal and related expenses in defending himself against the Department of Labor subpoena and related actions. Plaintiff furthermore has been put into a compromising position exposing Plaintiff to the potential of considerable and unnecessary liability in regard to the Department of Labor subpoena and related actions due to the fact that Defendants, and each of them, have denied Plaintiff access to all necessary and appropriate books, records, files and other information as requested by the United States Department of Labor. Plaintiff does not yet know the full extent and true amount of damages suffered as a result of the fraudulent misrepresentations of Defendants, and each of them, and will seek leave to amend this compliant when the full amount of damages is ascertained.
- 21. Defendants, and each of their, actions, in fraudulently misrepresenting the true facts and their true intentions, were intentional and done for the purpose of inducing plaintiff to take the actions hereinabove described and, therefore, Plaintiff is entitled to punitive and exemplary damages in an amount to be determined at trial.

#### THIRD CAUSE OF ACTION

(Intentional Interference with Economic Relationship Against all Defendants)

- 22. Plaintiff repeats and realleges each and every allegation in Paragraphs One thru Sixteen, inclusive, as if fully set forth herein.
- 23. Defendants, and each of them, knew of the above described relationship between Plaintiff and the Arch Specialty Insurance Company in that defendants, and each of them, had copies of the insurance policy in question and provided information to Arch during Arch's investigation of the claim.
- 24. On or about August 19, 2005, and continuing thereafter, defendants, and each of them, continued to falsely represent to Plaintiff that they were pursuing coverage pursuant to the policy of insurance issued by Arch and that, as a result, Plaintiff would enjoy the benefits of that policy of insurance. Defendants, and each of them, made these representations not only to Plaintiff but to third parties as well.
- 25.On or about February, 2006, the Arch denied coverage under the policy of insurance as a result of the misrepresentations, falsehoods and breaches made by Defendants, and each of them.
- 26. As a proximate result of defendants, and each of their, conduct, and the denial of coverage pursuant to the policy of fiduciary liability insurance in place at the time, plaintiff has suffered damages in an amount to be proven at trial.

Filed 12/06/2007

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27. The aforementioned acts of defendants, and each of them, were willful, oppressive, fraudulent and malicious. Plaintiff is therefore entitled to punitive damages.

#### FOURTH CAUSE OF ACTION

(Negligent Interference with Economic Relationship Against All Defendants)

- 28. Plaintiff repeats and realleges each and every allegation in Paragraphs One thru Twenty Seven, inclusive, as if fully set forth herein.
- 29. Defendants, and each of them, were informed when they agreed to provide fiduciary liability insurance that their failure to cooperate with Arch in its investigation into the claim, its failure to provide honest and accurate information and its failure to make all regarding a claim available to Plaintiff and Arch would cause Plaintiff to lose the benefits and advantages of the policy of insurance and cause Plaintiff to be exposed to liability for acts engaged in while Trustee of the End of the Road Trust, acts which should have been covered pursuant to the policy of insurance.
- 30. Defendants, and each of them, nevertheless negligently failed to provide Arch with truthful and accurate information regarding the claim in a timely manner, failed to cooperate with Arch and failed to provide Arch and Defendant with all relevant information.
- 31. As a result of defendants, and each of their, negligence, plaintiff was denied coverage despite the existence of the policy of insurance, all to his damage in an amount to be proven at trial.

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#### FIFTH CAUSE OF ACTION

Filed 12/06/2007

#### (Conspiracy Against All Defendants)

- 32. Plaintiff repeats and realleges each and every allegation in Paragraphs One thru Thirty One, inclusive, as if fully set forth herein.
- 33. On or about August 2005, and continuing thereafter, Defendants, and each of them, knowingly and willingly conspired and agreed among themselves to withhold pertinent, honest and accurate information to both Arch and Plaintiff and instead provided false, misleading and fraudulent information to Arch Specialty Insurance Company so as to manipulate Arch's investigation of the Department of Labor's subpoena and related activities, resulting in the denial of coverage for Plaintiff in regard to the United States Department of Labor subpoena, and related activities, pursuant to the policy of fiduciary liability insurance issued by Arch.
- 34. Pursuant to Exhibit A, attached hereto, Defendants, and each of them provided Arch with false and misleading information so as to have Arch deny coverage pursuant to the policy of insurance.
- 35. Defendants, and each of them, did the acts and things herein alleged pursuant to, and in furtherance of, the conspiracy and above alleged agreement.
- 36. Plaintiff is informed and believes and thereon alleges that the last overt act in pursuance of the above described conspiracy occurred on or about April 13, 2006 on which date defendants, and each of them continued to provide Arch with false and misleading information.

Filed 12/06/2007

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37. Plaintiff did not know of the conspiracy as hereinabove described until on or about March 2007 when, pursuant to a review of documents heretofore unavailable, Plaintiff discovered the correspondence identified as Exhibit A hereto. Since said information was in the possession of Defendants, and each of them, until such time as Plaintiff discovered said correspondence pursuant to discovery requests in another matter involving the End of the Road Trust, plaintiff had no reason or ability to determine the existence of said documents. 38. As a proximate result of the wrongful acts herein alleged, Plaintiff has been generally damaged in an amount to be determined at trial. 39. In doing the things herein alleged, defendants, and each of them, acted with malice, oppression and fraud, willfully and with the intent to cause injury to Plaintiff. Defendants were therefore guilty of malice, oppression and fraud in conscious disregard of Plaintiff's rights, thereby warranting an assessment of punitive damages in an amount appropriate to punish defendants and deter others from engaging in similar misconduct.

WHEREFORE, Plaintiff prays judgment against Defendants, and each of them, as follows:

#### FIRST CAUSE OF ACTION

- 1. For general damages in an amount to be proven at trial
- 2. For special damages in an amount to be proven at trial

#### SECOND CAUSE OF ACTION

- 3. For general damages in an amount to be proven at trial
- 4. For special damages in an amount to be proven at trial

1	For punitive or exemplary damages in an amount to be proven at trial
2	
3	THIRD CAUSE OF ACTION
4	6. For general damages in an amount to be proven at trial
5	7. For special damages in an amount to be proven at trial
6	For punitive or exemplary damages in an amount to be proven at trial
7	
8	FOURTH CAUSE OF ACTION
9	9. For general damages in an amount to be proven at trial
10	10. For special damages in an amount to be proven at trial
11	
12	FIFTH CAUSE OF ACTION
13	11. For general damages in an amount to be proven at trial
14	12. For special damages in an amount to be proven at trial
15	13. For punitive or exemplary damages in an amount to be proven at trial
16	
17	ALL CAUSES OF ACTION
18	14. For attorney fees and costs incurred herein
19	15. For such other and further relief as the Court deems just and proper
20	
21	Dated this 15 <sup>th</sup> day of June, 2007
22	
23	PHILLIP B. GREER Attorney for Plaintiff
24	Chriss Street
25	



### & WEST LLP

ATTORNEYS AT LAW

One Market Street Steuart Tower Suite 1300 San Francisco, California 94105 phone 415.617.2400 fax 415.617.2409 tuckerellis.com

> Direct Dial: 415.617.2224 Email: Kwest@tuckerellis.com

April 13, 2006

#### VIA CERTIFIED MAIL & E-MAIL

Ali M.M. Mojdehi, Esq. Baker & McKenzic LLP 101 West Broadway, Twelfth Floor San Diego, California 92101-3890

Re:

Insured:

Pension Transfer Corporation/End of the Road Trust

Insurer:

Arch Specialty Insurance Company

Policy:

Fiduciary Liability Insurance

Policy No.:

FDC00090600

Policy Period:

July 17, 2005 to July 17, 2006

Ref. Nos.

Arch: 20675

TEW: 10177/00005

Claim:

DOL Subpoena to Chriss W. Street

#### Dear Mr. Mojdehi:

Our firm has been retained to represent the interests of Arch Specialty Insurance Company ("Arch") in connection with the August 19, 2005, Department of Labor ("DOL") subpoena ("the DOL Subpoena") issued to Chriss W. Street ("Street"), former Trustee of End of the Road Trust ("the Trust"). The DOL Subpoena was reported to Arch under Fiduciary Liability Insurance Policy No. FDC000990600 ("the Policy"). We write to respond to your letter to Arch dated January 31, 2006.

We have carefully re-examined the provisions of the Policy in light of your correspondence. While Arch has modified certain of its positions, it continues to appear that the Policy would not afford coverage for any loss to Street or the Trust arising from the DOL Subpoena. In addition, Arch has identified additional coverage issues which otherwise could serve to preclude or limit coverage. Such coverage issues also are discussed herein.

ATTORNEYS AT LAW

Ali M.M. Mojdehi Baker & McKenzie LLP

Re: Pension Transfer Corporation/End of the Road Trust/DOL Subpoena to Street April 13, 2006

Page 2

#### RESPONSE TO JANUARY 31, 2005 LETTER

#### Arch's Communications with Mr. Street A.

We acknowledge your concern with regard to the Policy's notice provisions given the replacement of Street by Daniel W. Harrow ("Harrow") as the current Trustee and sole authorized representative of the Named Corporations (i.e., Pension Transfer Corporation and/or End of the Road Trust), effective August 2, 2005. However, your contention that the October 19. 2005 letter from Street's attorney (Joseph C. Faucher), as well as Arch's Response, "are in abrogation of the essential terms and conditions of the Policy" is an exaggeration under the circumstances. Street is an Insured Person under the Policy, a point which you appear ready to concede.

Nevertheless, Arch regrets this oversight and Mr. Harrow's delayed receipt of Arch's November 18, 2005 letter. In the future, we will direct all communications to you and/or Mr. Harrow. As you may already know, on March 22, 2006, Arch issued coverage correspondence to Donald Sheetz in connection with his December 12, 2005 notice to Arch involving the action styled Double A Trailer Sales, Inc. v. Chriss W. Street, et al. ("the Double A Action"). We understand that Mr. Sheetz and Mr. Harrow have discussed the Double A Action and that Mr. Harrow was aware that Mr. Sheetz would be reporting the Double A Action to Arch.

#### В. The DOL Subpoena is a Potential Claim

After further consideration, Arch is now of the view that the DOL Subpoena is not a Claim as initially asserted. However, we have considered whether the subpoena is a potential Claim. In relevant part, Section VII of the Policy states that:

> If during the Policy Period the Insureds shall become aware of any circumstances which may reasonably be expected to give rise to a Claim being made against an Insured and shall give written notice to the Insurer of the circumstances, the anticipated allegations of Wrongful Act(s) and the reasons for anticipating such a Claim, with full particulars as to dates, persons and entities involved, then a Claim which is subsequently made against such Insured and reported to the Insurer for a Wrongful Act:

which is the same as any Wrongful Act alleged or contained (1)in such notice, or

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ATTORNEYS AT LAW

Ali M.M. Mojdehi Baker & McKenzie LLP

Re: Pension Transfer Corporation/End of the Road Trust/DOL Subpoena to Street April 13, 2006

Page 3

(2) which together with any Wrongful Act alleged or contained in such notice constitute Interrelated Wrongful Acts,

shall be considered made at the time such notice of circumstances was first given to the Insurer. However, the Insurer shall not be liable under this Policy for any amount incurred by an Insured in the defense, investigation or settlement of any such potential Claim prior to the date the Claim is actually made against the Insured.

The DOL Subpoena contains the following requests:

- <u>Request No. 5.</u> "All documents relating to the decision to retain SAM [Street Asset Management] as a service provider for the Plan."
- Request No. 6. "All documents reflecting any communication, analysis, evaluation, report, recommendation or request for information or advice relating to the investment of the Plan in Dorsey Trailer or Dorsey Holdings."
- Request No. 8. "All documents reflecting your investment or legal advice, opinions, or recommendations relating to the Plan."
- Request No. 9. "All documents reflecting any indemnification agreement, other agreement, or insurance policy (including any fiduciary liability, professional liability, directors and officers liability, or errors and omissions liability policy)
   that may cover any losses incurred by the Plan."

The foregoing requests relate to Street's conduct in connection with the Fruehauf Trailer Corporation Retirement Plan and appear to suggest that the DOL's suspects self-dealing by Street. Thus, a reasonable person could conclude the subpoena involves circumstances which may reasonably be expected to give rise to a Claim by the DOL. It therefore appears the DOL Subpoena represents a potential Claim and, accordingly, Arch will treat the October 19, 2005 letter of Street's attorney (Joseph C. Faucher) as notice of a potential Claim. That said, Arch would have no obligation to indemnify any of Street's expense in responding to the DOL Subpoena; coverage would be available only for those expenses incurred after an actual Claim is made against Street.



ATTORNEYS AT LAW

Ali M.M. Mojdehi Baker & McKenzie LLP

Re: Pension Transfer Corporation/End of the Road Trust/DOL Subpoena to Street

April 13, 2006

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#### C. Misrepresentations in the Application

Even though the DOL Subpoena is a potential Claim, and not a Claim, the Company was still required to disclose the DOL subpoena in its Policy Application.

#### Application

The Policy defines Application to mean:

[E]ach and every signed application, any attachments to such applications, other materials submitted therewith or incorporated therein and any other documents submitted in connection with the underwriting of this Policy or the underwriting of any other fiduciary, directors and officers and/or corporation (or equivalent) liability policy issued by the Insurer, or any of its affiliates, of which this Policy is a renewal, replacement or which it succeeds in time .

The Trust submitted to Arch an "Application for Fiduciary Insurance," signed by Daniel Harrow and dated October 3, 2005. This submission is an Application, as defined.

The Trust also submitted warranty letters, signed by Daniel Harrow, and dated August 31, 2005 and September 6, 2005. The warranty letters are part of the "Application for Fiduciary Insurance" dated October 3, 2005 because they are, at a minimum, "any other documents submitted in connection with the underwriting of this Policy."

#### 2. Section XVIII [Representations]

Section XVIII [Representations] of the Policy provides that:

By acceptance of this Policy the Insureds agree that the statements in the Application are their agreements and representations and that this Policy is issued in reliance upon the truth of such agreements and representations, which are deemed material to the acceptance of the risk or the hazard assumed by the Insurer under the Policy.

If any Insured has knowledge or information, as of the effective date of the Application, of any act, error, omission or circumstance

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Ali M.M. Mojdehi Baker & McKenzie LLP

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April 13, 2006

Page 5

which may give rise to a Claim and which is required to be disclosed in the Application, whether or not actually disclosed in the Application, any Claim subsequently arising therefrom shall be excluded from coverage under this Policy; provided this paragraph does not limit and is without prejudice to any other rights, defenses and remedies available to the Insurer. Only the knowledge of Executives shall be imputed to the Corporation and any Plan for purposes of this Section XVIII.

#### 3. Application Question

The Company submitted to Arch an "Application for Fiduciary Insurance," signed by Dan Harrow and dated October 3, 2005. Page six of the Application contains the following question:

#### PRIOR KNOWLEDGE

Does any person or entity for whom this insurance is intended, have any knowledge or information concerning any actual or alleged act, error, omission, fact or circumstance which may give rise to a Claim which may fall within the scope of the proposed insurance? (emphasis supplied)

IT IS UNDERSTOOD AND AGREED THAT IF SUCH KNOWLEDGE OR INFORMATION EXISTS, ANY CLAIM ARISING THEREFROM IS EXCLUDED FROM THIS PROPOSED INSURANCE.

In response, the Trust answered "No" and "None Known."

#### 4. The Warranty Letters

The August 31, 2005 warranty letter, which was signed by Mr. Harrow, stated "please be advised that I am not aware of any incident that might result in a loss since July 17, 2005." The September 6, 2005 warranty letter, signed by "a trustee," states that we are not aware of any known losses that involve the Fiduciary Liability placement."

ATTORNEYS AT LAW

Ali M.M. Mojdehi
Buker & McKenzie LLP
Re: Pension Transfer Corporation/End of the
Road Trust/DOL Subpoena to Street
April 13, 2006
Page 6

#### 5. Analysis

As disused above, the DOL Subpoena constitutes a potential Claim against Street. Street is an Insured Person and an Executive, as defined, and thus is a "person for whom this insurance is intended." Street was served with the DOL Subpoena on August 19, 2005. Thus, as of October 3, 2005, at least one Insured Person and Executive (Street) had "knowledge or information concerning any actual or alleged act, error, omission, fact or circumstance which may give rise to a Claim which may fall within the scope of the proposed insurance." Accordingly, Mr. Harrow's negative response to the above Application question and the statements in the warranty letters were false when made. Mr. Harrow's actual knowledge or lack of knowledge of the DOL Subpoena is irrelevant in this regard.

Therefore, contrary to your assertions, Arch has a substantial basis to contend that misrepresentations were made to it during the Application process and Arch's assertion of the same was entirely appropriate. Moreover, as discussed below, there is evidence that the Trust may have made additional misrepresentations relating to the nature of the Trust's business.

Based on the foregoing, Arch affirms its declination and sees no basis to "retract" its earlier response as you request.

#### ADDITIONAL COVERAGE ISSUES

#### A. Potential Claim

As we noted previously, Faucher's October 19, 2005 letter is notice of a potential Claim. Arch has no obligation to indemnify any of Street's expense in responding to the DOL Subpoena. Such obligation, if any, would arise only after an actual Claim is made against Street and would be limited to expenses incurred after such Claim was made.

#### B. Exclusions

Pursuant to Section IV [Exclusions] of the Policy, the Insurer shall not be liable to make any payment for Loss as a result of a Claim made against an Insured:

(a) arising out of, based upon or attributable to the gaining of any profit, remuneration or financial advantage to which such Insured was not legally entitled, as evidenced by a written statement or written admission by such Insured or a judgment or other final



Ali M.M. Moidehi Baker & McKenzie LLP

Re: Pension Transfer Corporation/End of the Road Trust/DOL Subpoena to Street

April 13, 2006

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adjudication in the underlying action or in a separate action, alternative dispute resolution process (including one pursuant to Section XIV) or other proceeding;

(b) arising out of, based upon or attributable to the committing of any deliberate criminal or deliberate fraudulent act by such Insured, as evidenced by a written statement or written admission by such Insured or a judgment, ruling or other finding of fact in the underlying action or in a separate action, alternative dispute resolution process (including one pursuant to Section XIV) or other proceeding.

To the extent the DOL Subpoena suggests the DOL may suspect Street of self-dealing. Arch reserves the right to decline coverage for any Claim which actually results from the DOL Subpoena, containing such allegations, pursuant to Exclusions (a) and (b) of the Policy.

#### Possible Misrepresentations Regarding Nature of Business

Arch has become aware of information which suggests that the Trust may have made additional misrepresentations in its Policy Application dated October 3, 2005. Such misrepresentations may involve statements relating to the nature of the Trust's business and whether the Trust was in control of any Plans at the time the Trust was submitted. Arch is investigating this issue and expressly reserves the right to deny coverage for any Claim arising from the DOL Subpoena based on any such misrepresentations. Arch also reserves the right to reform or rescind the Policy.

#### CONCLUSION

Arch reserves the right to supplement the coverage positions set forth herein, specifically including the right to raise additional coverage defenses under the Policy, including the right to rescind the Policy, should the facts and circumstances developed in this matter so warrant.

Such misrepresentations relate to what you describe as "an error that was committed (which error may have been due to Arch's negligence in part) in the inappropriate conversion of the policy to a runoff policy." From our investigation thus far, it appears any such "error" is attributable entirely to the Trust and its agents.



ATTORNEYS AT LAW

Ali M.M. Mojdehi Baker & McKenzie LLP

Re: Pension Transfer Corporation/End of the Road Trust/DOL Subpoena to Street

April 13, 2006

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Accordingly, the comments herein concerning coverage are based upon the facts presently known with regard to the DOL investigation. If you believe that any of the coverage positions taken herein by Arch are incorrect, please advise us and Arch will be pleased to consider any additional information or arguments it may wish to submit. In the interim, all rights of Arch arising under the Policy, any applicable law and in equity, should be considered fully and specifically reserved at all times.

While we encourage you to first contact us or Arch with any questions or concerns you may have with regard to this letter, you may be entitled to have its claim reviewed by the California Department of Insurance to the extent you disagree with any or all of the positions expressed herein. Your inquiry should be directed as follows:

> California Department of Insurance Claims Service Bureau - 11th Floor 300 South Spring Street Los Angeles CA 90013

Telephone:

1-800-927-HELP

1-800-927-4357 1-213-897-8921

Once you have had an opportunity to review this letter, feel free to contact us with any questions or comments you may have.

Very truly yours,

KWW/WJL/PKS

Cc: Please see attached list.

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ATTORNEYS AT LAW

Ali M.M. Mojdehi
Baker & McKenzie LLP

Re: Pension Transfer Corporation/End of the Road Trust/DOL Subpoena to Street April 13, 2006

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cc: Claudia Cinardo (via e-mail)
Arch Insurance Company

Daniel W. Harrow (via regular mail) End of the Road Trust 11766 Wilshire Blvd. Suite 870 Los Angeles, CA 90025

Joseph C. Faucher (via regular màil) Reish, Luftman, Reicher & Cohen 11755 Wilshire Blvd. 10th Floor Los Angeles, California, 90025-1539

Chriss W. Street (via regular mail) 1111 Bayside Drive Carona del Mar, California 92625

Bill Schwartz (via regular mail) Schwartz & Company P.O. Box 1260 La Quinta, CA 92247

Mary Walrond (via e-mail at mwalrond@trinitymgrs.com)
Trinity Managers International

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DECLARATION OF SERVICE

The undersigned certifies and declares as follows:

I am employed in the City of Newport Beach and County of Orange, in the State of California.

I am over the age of 18 and not a party to the within action. I am employed by Blakeley & Blakeley LLP, whose business address is 1000 Quail Street, Suite 200, Newport Beach, California 92660.

On July 18, 2007, I served the forgoing document described as:

NOTICE OF REMOVAL OF CIVIL ACTION TO FEDERAL COURT

on the interested parties in this action [X] by placing [] the original [X] a true copy thereof enclosed in sealed envelopes, with postage fully prepaid, addressed as follows:

#### SEE ATTACHED SERVICE LIST

[X] By U.S. Mail

[X] I am readily familiar with Blakeley & Blakeley's practice of collecting and processing correspondence for mailing via U.S. Mail. Correspondence so collected and processed is deposited with the United States Postal Service that same day in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit of mailing in declaration

[X] I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on **July 18, 2007**, at Newport Beach, California.

Megan Rutledge

Proof of Svc Mail (MR)

### **SERVICE LIST:**

**COUNSEL FOR PLAINTIFF** 

PHILLIP B. GREER LAW OFFICES OF PHILLIP B. BREER 1280 Bison Road B9-531 Newport Beach, CA 92660

FILED

NAME. ADDRESS & TELEPHONE NUMBER OF ATTORNEY(S) FOR, OR, PLAINTIFF OR DEFENDANT IF PLAINTIFF OR DEFENDANT IS PRO PER

Scott E. Blakeley Blakeley & Blakeley LLP 1000 Quail Street, Ste. 200 Newport Beach, California 92660

Ph: 949-260-0611 Fx: 949-260-0613

ATTORNEYS FOR: Defendant, Daniel Harrow

2007 JUL 19 PM 12: 25

LEAK U.S. DISTRICT COURT CENTRAL DIST. OF CALIF. SANTA ANA

UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA

CASE NUMBER Chriss Street SACV07-829JVS (ANx) Plaintiff(s), Daniel Harrow CERTIFICATION AND NOTICE OF INTERESTED PARTIES (Local Rule 7.1-1) Defendant(s)

#### TO: THE COURT AND ALL PARTIES APPEARING OF RECORD:

The undersigned, counsel of record for Daniel Harrow

(or party appearing in pro per), certifies that the following listed party (or parties) has (have) a direct, pecuniary interest in the outcome of this case. These representations are made to enable the Court to evaluate possible disqualification or recusal. (Use additional sheet if necessary.)

#### **PARTY**

#### CONNECTION

(List the names of all such parties and identify their connection and interest.)

End of the Road Trust

Plaintiff is the former Trustee and Defendant is the current Trustee of the End of the Road Trust

Arch Specialty Insurance Company

Arch Specialty Insurance Company is the provider of the Fiduciary Liability Insurance for the trustee of the End of the

Road Trust

7/19/07

Date

Scott E. Blakeley

Attorney of record for or party appearing in pro per

NOTICE OF INTERESTED PARTIES

ORIGINAL

### UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA

#### NOTICE OF ASSIGNMENT TO UNITED STATES MAGISTRATE JUDGE FOR DISCOVERY

This case has been assigned to District Judge James V. Selna and the assigned discovery Magistrate Judge is Arthur Nakazato.

The case number on all documents filed with the Court should read as follows:

SACV07 - 829 JVS (ANx)

Pursuant to General Order 05-07 of the United States District Court for the Central District of California, the Magistrate Judge has been designated to hear discovery related motions.

All discovery related motions should be noticed on the calendar of the Magistrate Judge

#### NOTICE TO COUNSEL

A copy of this notice must be served with the summons and complaint on all defendants (if a removal action is filed, a copy of this notice must be served on all plaintiffs).

Subsequent documents must be filed at the following location:

Western Division
312 N. Spring St., Rm. G-8
Los Angeles, CA 90012

[X] Southern Division 411 West Fourth St., Rm. 1-053 Santa Ana, CA 92701-4516 Eastern Division
3470 Twelfth St., Rm. 134
Riverside, CA 92501

Failure to file at the proper location will result in your documents being returned to you.

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Proff of Svc Via Mail (MB) Federal

#### DECLARATION OF SERVICE

The undersigned certifies and declares as follows:

I am employed in the City of Newport Beach and County of Orange, in the State of California.

I am over the age of 18 and not a party to the within action. I am employed by Blakeley & Blakeley LLP, whose business address is 1000 Quail Street, Suite 200, Newport Beach, California 92660.

On July 20, 2007, I served the forgoing document described as:

# NOTICE OF ASSIGNMENT TO UNITED STATES MAGISTRATE JUDGE FOR DISCOVERY

on the interested parties in this action [X] by placing [] the original [X] a true copy thereof enclosed in sealed envelopes, with postage fully prepaid, addressed as follows:

#### SEE ATTACHED SERVICE LIST

[X] By U.S. Mail

[X] I am readily familiar with Blakeley & Blakeley's practice of collecting and processing correspondence for mailing via U.S. Mail. Correspondence so collected and processed is deposited with the United States Postal Service that same day in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit of mailing in declaration

[X] I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on **July 20, 2007**, at Newport Beach, California.

Madison Bush

### **SERVICE LIST:**

### **COUNSEL FOR PLAINTIFF**

PHILLIP B. GREER LAW OFFICES OF PHILLIP B. GREER 1280 Bison Road B9-531 Newport Beach, CA 92660 Document 26-6

Case 1:07-cv-00793-SLR

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Lacks knowledge or information sufficient to form a belief as to the truth 3. of the allegations contained in paragraph 3, and on that basis denies the allegations.

Denies the allegations contained in paragraph 4. 4.

Admits the allegations contained in paragraph 2.

- Lacks knowledge or information sufficient to form a belief as to the truth 5. of the allegations contained in paragraph 5, and on that basis denies the allegations.
- Lacks knowledge or information sufficient to form a belief as to the truth 6. of the allegations contained in paragraph 6, and on that basis denies the allegations.
  - 7. Denies the allegations contained in paragraph 7.
- Lacks knowledge or information sufficient to form a belief as to the truth 8. of the allegations contained in paragraph 8, and on that basis denies the allegations.
- 9. Lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 9, and on that basis denies the allegations.
- Lacks knowledge or information sufficient to form a belief as to the truth 10. of the allegations contained in paragraph 10, and on that basis denies the allegations.
- Repeats the corresponding admissions and denials of paragraphs 1 11. through 10 herein.
  - 12. Denies the allegations contained in paragraph 12.
- Lacks knowledge or information sufficient to form a belief as to the truth 13. of the allegations contained in paragraph 13, and on that basis denies the allegations.
  - 14. Denies the allegations contained in paragraph 14.
- Lacks knowledge or information sufficient to form a belief as to the truth 15. of the allegations contained in paragraph 15, and on that basis denies the allegations.

Repeats the corresponding admissions and denials of paragraphs 1

16.

through 15 herein.

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- 17. Denies the allegations contained in paragraph 17.
  18. Denies the allegations contained in paragraph 18.
  19. Lacks knowledge or information sufficient to form a belief as to the truth
  - 20. Denies the allegations contained in paragraph 20.
  - 21. Denies the allegations contained in paragraph 21.
- 22. Repeats the corresponding admissions and denials of paragraphs 1 through 21 herein.

of the allegations contained in paragraph 19, and on that basis denies the allegations.

- 23. Denies the allegations contained in paragraph 23.
- 24. Denies the allegations contained in paragraph 24.
- 25. Lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 25, and on that basis denies the allegations.
  - 26. Denies the allegations contained in paragraph 26.
  - 27. Denies the allegations contained in paragraph 27.
- 28. Repeats the corresponding admissions and denials of paragraphs 1 through 27 herein.
  - 29. Denies the allegations contained in paragraph 29.
  - 30. Denies the allegations contained in paragraph 30.
  - 31. Denies the allegations contained in paragraph 31.
- 32. Repeats the corresponding admissions and denials of paragraphs 1 through 31 herein.

		Case 1:07-cv-00793-SLR		
	1	33. Denies the allegations contained in paragraph 33.		
	2	34. Denies the allegations contained in paragraph 34.		
	3	35. Denies the allegations contained in paragraph 35.		
36. Denies the allegations contained in paragraph 36.				
	5	37. Lacks knowledge or information sufficient to form a belief as to the truth		
	6 7	of the allegations contained in paragraph 37, and on that basis denies the allegations.		
	8	38. Denies the allegations contained in paragraph 38.		
	9	39. Denies the allegations contained in paragraph 39.		
	10			
	11	AFFIRMATIVE DEFENSES		
	12	<u>FIRST AFFIRMATIVE DEFENSE</u>		
	13	(Failure to State a Cause of Action)		
The Complaint, and each and every cause of action therein, fails to				
	15	of action upon which relief can be granted. Accordingly, the First, Second, Third,		
	16	Fourth, and Fifth causes of action of the Complaint should be dismissed.		
	SECOND AFFIRMATIVE DEFENSE			
	18	(Failure to State a Prayer Upon Which Relief May Be Granted)		
	19	The Complaint, and each and every cause of action therein, fails to state a		
	20	prayer upon which relief can be granted. Accordingly, the First, Second, Third,		
	22	Fourth, and Fifth causes of action of the Complaint should be dismissed.		
	23	· ·		
	23 24 (Consent; Ratification)			
	25	The Complaint, and each cause of action therein, is barred because Plaintiff		
	26	consented to and/or ratified the alleged conduct of Defendant.		
	27			
	28			
		ANSWER TO COMPLAINT		

Answer to Complaint v2

Defendant is estopped from asserting the causes of action alleged in the Complaint against Defendant.

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## NINTH AFFIRMATIVE DEFENSE

(Laches)

Plaintiff is barred in whole or in part by the equitable doctrine of laches from asserting the causes of action alleged in the Complaint against Defendant.

## TENTH AFFIRMATIVE DEFENSE

(Unclean Hands)

Plaintiff is barred in whole or in part by the equitable doctrine of unclean hands to assert the claims alleged in Complaint against Defendant.

## **ELEVENTH AFFIRMATIVE DEFENSE**

(Performance)

Defendant has fully performed each and every obligation required under any contract entered into between the parties.

# TWELFTH AFFIRMATIVE DEFENSE

(Failure to Mitigate)

Plaintiff has failed to mitigate its damages, thus barring or proportionately diminishing his recovery, if any, as alleged in the Complaint against Defendant.

# THIRTEENTH AFFIRMATIVE DEFENSE

(Set-Off)

To the extent that Plaintiff establishes any liability in damages against Defendant, which liability and damages Defendant denies, Defendant is entitled to an offset against such damages by reason of Plaintiff's breach of contract as set forth in the Complaint.

ANSWER TO COMPLAINT

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## FOURTEENTH AFFIRMATIVE DEFENSE

(Damages Not Proximately Caused by Defendant)

Defendant alleges that the causes of action are barred because all damages suffered by Plaintiff, if any, were not caused by any conduct or inaction of Plaintiff.

## FIFTEENTH AFFIRMATIVE DEFENSE

(Negligence)

Defendant alleges that the causes of action are barred because all damages, if any, sustained or suffered Plaintiff were proximately caused by the negligent conduct of Plaintiff.

## SIXTEENTH AFFIRMATIVE DEFENSE

(No Reliance)

Defendant alleges that the causes of action are barred because Plaintiff did not rely on the alleged misrepresentations.

Dated: August \_\_\_\_\_, 2007

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BLAKELEY & BLAKELEY LLP

Counsel for Defendant Daniel

Harrow

ANSWER TO COMPLAINT

## DECLARATION OF SERVICE

The undersigned certifies and declares as follows:

I am employed in the City of Newport Beach and County of Orange, in the State of California. I am over the age of 18 and not a party to the within action. I am employed by Blakeley & Blakeley LLP, whose business address is 1000 Quail Street, Suite 200, Newport Beach, California 92660.

On August 1, 2007, I served the forgoing document described as:

ANSWER TO COMPLAINT FOR DAMAGES FOR (1) BREACH OF CONTRACT; (2) FRAUD; (3) INTENTIONAL INTERFERENCE WITH ECONOMIC RELATIONS; (4) NEGLIGENT INTERFERENCE WITH ECONOMIC RELATIONS; AND (5) CONSPIRACY

on the interested parties in this action [X] by placing [] the original [X] a true copy thereof enclosed in sealed envelopes addressed as follows:

## SEE ATTACHED SERVICE LIST

## [X] BY FEDERAL EXPRESS

- [X] I deposited such envelope in a Federal Express drop box or other facility maintained by Federal Express at Newport Beach, California. The envelope was mailed with postage thereon fully prepaid.
- [X] I am readily familiar with Blakeley & Blakeley's practice of collecting and processing correspondence for mailing. Under that practice the envelope would be deposited with Federal Express on that same day with postage thereon fully prepaid at Newport Beach, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit of mailing in affidavit.
- [X] I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed on **August 1, 2007**, at Newport Beach, California.

Madison Bush

## **SERVICE LIST:**

**COUNSEL FOR PLAINTIFF** 

PHILLIP B. GREER LAW OFFICES OF PHILLIP B. GREER 1280 Bison Road B9-531 Newport Beach, CA 92660

PHILLIP B. GREER SBN 96438 LAW OFFICES OF PHILLIP B. GREER 1280 Bison Road B9-531 Newport Beach, California 92660 (949) 640-8911

Attorney for Plaintiff, Chriss Street

(949) 759-7687 (fax)

UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA SOUTHERN DIVISION

CHRISS STREET,

Plaintiff.

VS.

DANIEL HARROW, DOES 1 through 25,

inclusive.

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Defendant

Case No.: SACV 07-829-JVS(ANz)

PLAINTIFF'S NOTICE OF MOTION AND MOTION TO REMAND CASE TO STATE COURT

Date: September 10, 2007

Time: 1:30 pm Dept: 10C

Judge: Hon. James V. Selna

## TO DEFENDANTS AND THEIR ATTORNEY OF RECORD:

PLEASE TAKE NOTICE THAT ON September 10, 2007 at 1:30 pm or as soon thereafter as counsel may be heard, in Courtroom 10C of the above entitled court, located at 411 W. Fourth Street, Santa Ana, California, plaintiff, Chriss Street will and hereby does move the Court for an order remanding the above named action to State Court on the grounds that this Court lacks subject matter jurisdiction over the claims) AUG - 9 2001 asserted by Plaintiff.

PLAINTIFFS NOTICE OF MOTION AND MOTION TO REMAND -

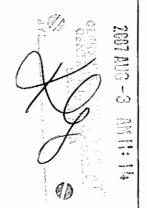
This motion is necessary and proper based upon 28 USC Section 1441(a) et seq which governs the Court's subject matter jurisdiction in this case. The motion is based upon this notice, the attached memorandum of points and authorities, the pleadings on file in this action, and upon such oral argument as shall be allowed at the hearing on this motion.

Dated this 2<sup>nd</sup> day of August, 2007

Attorney for Plaintiff Chriss Street

PHILLIP B. GREER SBN 96438 LAW OFFICES OF PHILLIP B. GREER 1280 Bison Road B9-531 Newport Beach, California 92660 (949) 640-8911 (949) 759-7687 (fax)

Attorney for Plaintiff, Chriss Street



# UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA SOUTHERN DIVISION

CHRISS STREET,

Plaintiff,

VS.

DANIEL HARROW, DOES 1 through 25,

inclusive,

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Defendant

Case No.: SACV 07-829-JVS(ANz)

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO REMAND

Date: September 10, 2007

Time: 1:30 pm

Dept: 10C

Judge: Hon James V Seina

# INTRODUCTION

On July 12, 2007, Plaintiff, Chriss Street filed an action in Orange County Superior Court against Daniel Harrow, as an individual, alleging a number of business torts, based upon California law, against Mr. Harrow arising out of conduct and actions taken by Mr. Harrow that have been and are detrimental to Mr. Street. The underlying basis for all operative claims is that Mr. Harrow made false and misleading statements

pertaining to Mr. Street's eligibility for coverage under various policies of insurance. In fact, coverage counsel for the insurance company that issued the policy of insurance concluded that Mr. Harrow provided responses to the insurance company that "were false when made." (Page Six of Exhibit A to Plaintiff's Complaint for Damages attached hereto as Exhibit 1). As a result of the statements made by Mr. Harrow, Mr. Street was denied coverage that should have been rightly afforded to him.

On July 18, 2007 Defendant removed the matter to Federal Court with the conclusory statement that Plaintiff's action are part of a bankruptcy proceeding in the State of Delaware. Other than this bare statement, Defendants offer no facts which would warrant removal of this case to Federal Court and then, ultimately, to the Bankruptcy Court in Delaware. Accordingly, this matter should be remanded in its entirety to Orange County Superior Court.

Additionally, removal for the improvident purpose of delaying the action or harassing Plaintiff, subjects Defendants, pursuant to 28 USC Section 1447(c) to liability for costs and fees.

FACTUAL BACKGROUND

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Plaintiff, pursuant to a policy of fiduciary liability insurance issued by Arch Specialty Insurance Company, sought coverage, pursuant to said policy, as a result of an investigation undertaken by the United States Department of Labor, including the issuance of a subpoena, demanding that Mr. Street appear and provide testimony regarding various issues that the Department of Labor was reviewing. Arch denied coverage of the claim and declined to provide a defense for Mr. Street, based upon an investigation of the facts surrounding investigation and subsequent issuance of the

subpoena. Arch, in investigating Mr. Street's claim, sought, and received, from Mr. Harrow information regarding the claim. Based upon the information provided by Mr. Harrow, Arch denied Mr. Street's claim and, as a result, Mr. Street had to incur, and continues to incur, costs and fees in dealing with the issue.

Subsequent to the denial of the claim by Arch, Mr. Street, pursuant to discovery in another, unrelated, matter discovered correspondence, dated April 13, 2006, and attached as Exhibit A to the underlying complaint filed by Mr. Street in State Court, which details Arch's rational for denying Mr. Street coverage. That correspondence, from coverage counsel for Arch Insurance, unequivocally states and concludes that Mr. Harrow made false statements to the investigators reviewing Mr. Street's claim and that the denial of Mr. Street's claim was based, if not entirely then predominantly, upon those false statements.

Upon discovery of the actions of Mr. Harrow, Mr. Street filed a complaint in Orange County Superior Court based entirely upon California state law. However, in an act meant to merely delay and harass Plaintiff, on July 18, 2007, Defendants filed a Notice of Removal stating the litigation is related to US Bankruptcy Court (Dist. Delaware) Case No 96-1563(PJW)

## REMAND IS BOTH APPROPRIATE AND NECESSARY

In that Plaintiff chose to file the complaint in Orange County Superior Court, the case "may be removed only if the district court could have exercised jurisdiction of the action if originally filed there." *Duncan v Stuetzl* 76 F3d 1480 (9th Cir 1996).

Additionally, "if there is doubt as to removability, it is resolved in favor of remanding the case to state court." *Daniels v Philip Morris Cos* 18 F Supp 2d 1110 (S.D. Cal 1998)

Remand to state court may be ordered either for lack of subject matter jurisdiction or for any defect in the removal procedure. 28 USC Section 1447(c). In addition, if the federal claim is separate and independent, is joint with a non-removable claim and/or issues of state law predominate, the entire case may be remanded. 28 USC Section 1441(c).

The Ninth Circuit has consistently held that because of the congressional desire and intent to restrict the jurisdiction of the federal courts on removal, the statute is strictly construed and federal jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance. *Duncan* 76F3d at 1485. As such, there is a "strong presumption against removal jurisdiction." *Guas v Miles Inc* 980 F2d 566 (9<sup>th</sup> Cir 1992) Where federal jurisdiction is doubtful, a remand is necessary. *Sherman v Sigma Alpha Mu Fraternity* (2001) 128 F Supp 842

In their Notice of Removal, Defendants make the conclusory allegation that the underlying state action is somehow a "core bankruptcy proceeding" without stating any facts which demonstrate that there is a federal question, much less a bankruptcy question, involved. In the instant matter, Plaintiff's causes of action against Daniel Harrow are alleged against him as an individual and involve actions committed outside of the bankruptcy proceedings. They are not germane to any bankruptcy proceedings.

Defendants reliance on 28 USC 1334(b) and 28 USC 1452(a), as interpreted through 28 USC 1441(b) is misplaced. 28 USC 1334, in pertinent part, provides that on a timely motion by any party to the state court action, the federal court must abstain from exercising jurisdiction pursuant to that code section where all of the following are shown:

The state court action is based on a state law claim or cause of action;

Re Woods (5<sup>th</sup> Cir 1987) 825 F2d 90):

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3. Federal courts would otherwise have no jurisdiction over the state law claim (i.e. no diversity of citizenship between the parties); and 4. The matter can be "timely adjudicated" in a state court of "appropriate

jurisdiction"

Here, all the criteria are met: the action is based upon a state law claim, there is no diversity

2. The claim or cause of action is merely "related" to a bankruptcy case (See In

jurisdiction amongst the Defendants, the causes of action simply involve to two of many parties participating in a bankruptcy proceeding three thousand miles away, the federal courts would not otherwise have jurisdiction over these claims and the matter was already proceeding in state court.

As such, under 28USC 1334(c)(2) there is no removal jurisdiction and this Court must, thereforer, abstain from exercising jurisdiction over this matter and remanded the action to state court. Furthermore, a district court must abstain from hearing a purely state law claim where there is no other basis for federal jurisdiction other that its relatedness to a bankruptcy proceeding and where the claim can be timely adjudicated in state court. State Bank of Lombard v Charthouse Inc (ND IL 1985) 46 BR 468

The federal court also has discretionary power to abstain "in the interest of justice, or in the interest of comity with State courts or respect for State law" (28 USC 1334(c)(1)) and may remand on any equitable ground (28 USC 1452(b)) For example, abstention and remand may be ordered because state issues substantially predominate and/or because the state court is thoroughly familiar with the matter so that judicial economy would be served by remand. As such, even if the Court is not mandated to

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abstain from exercising jurisdiction, the Court may do so by exercising its discretionary power of abstention. In that there are no federal claims set forth in the underlying action, the Defendants have not proven that this is a core bankruptcy action, much less one arising from post confirmation bankruptcy proceedings, the Court should remand the case to state court where Plaintiff will have the ability and opportunity to seek a remedy to his claims based upon California law, the law under which the action was brought.

The courts have consistently held that "a cause of action arises under federal law only when the plaintiff's well-pleaded complaint raises issues of federal law." Metro Life Insurance Co v Taylor 481 US 58, 107 S Ct 1542. Here, the complaint, regardless of how well pled, does not raise any triable issue of federal law. The action is based upon California law and, as such, should be decided by the California courts. The courts have consistently held that a proceeding that does not involve a substantive right created by the federal bankruptcy law, and is one that could exist outside of bankruptcy, is not a core proceeding. For a case to be considered a core proceeding, the case would not exist but for bankruptcy. Doshea Dean et al v American General Finance (1996) 191 BR 463

Here, the allegations against Mr. Harrow exist independent of the bankruptcy. Mr. Street's request for coverage pursuant to an existing policy of fiduciary liability insurance has nothing to do with the relationship between debtors and creditors and has everything to do with the malicious actions of a vengeful individual outside the parameters of any bankruptcy proceeding. It is settled law that a proceeding that does not involve a substantive right created by the federal bankruptcy law, and is one that could exist outside of bankruptcy, is not a core proceeding. Doshea Dean at page 468 Doshea Dean goes on to hold that there must be a nexus between the bankruptcy proceeding and the related action. A controversy, the resolution of which may only have

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speculative, indirect or incidental effects on the bankruptcy estate is unrelated to the bankruptcy and not one over which the bankruptcy court can exercise jurisdiction. Doshea Dean at page 470 As is quite clear from the complaint filed in state court, Mr. Street seeks nothing by way of the bankruptcy estate; his action is against Mr. Harrow in his capacity as a resident of the State of California.

In Epi-Scan Inc v Estee Lauder Inc (1987) 71 BR 975, the court wrestled with the question of what to do when there is both a core and non core proceeding alleged in a removal petition. When the removal was challenged on remand, the court concluded that even if the mandatory abstention provisions of the code were not applicable, the discretionary provisions prevailed and the matter should be remanded. Using criteria developed over the years, the court found that where the challenged action related to but did not arise under the bankruptcy code and could not have been commenced in a court of the United States absent jurisdiction under Section 1334, where the action is pending in an appropriate state forum and can be timely adjudicated therein, the litigation should, as a matter of course, be remanded back to the state court. See also Retirement Systems of Alabama v Merrill Lynch & Co (2002) 209 F Supp2d 1257, Here, there is no core proceeding to conflict with non-core actions, despite Defendants unsupported, arbitrary statement that a business tort commenced under California law constitutes a core proceeding in a Delaware bankruptcy.

Where a state court proceeding sounds in state law and bears a limited connection to the bankruptcy case, abstention is particularly compelling. In Re Titan Energy Inc (1988) 837 F 2d 325. The bankruptcy court, where this matter is headed if Defendants have their way, need not exercise jurisdiction where the nexus between the related state court action and the bankruptcy estate is attenuated. In Re Titan at page 333. In Re Nanodata Computer Corporation (1987) 74 BR 766, 77 goes even further,

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holding that bankruptcy jurisdiction is not intended as a method of bringing state claims into a federal forum. Federal Courts acting in the bankruptcy context should deal with state law only to the extent such is necessarily and directly implicated by the bankruptcy issues. Debtor-creditor relationships, which are at the core of the federal bankruptcy power, must be distinguished from the adjudication of state created private rights, such as the right to recover damages arising from contracts and business torts. In re Nanodata at page 79 Questions or doubts as to jurisdiction and the appropriateness of remand are to be resolved in favor of returning the matter to the state court. Doshea Dean at page 466

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## SANCTIONS ARE APPROPRIATE IN THIS MATTER

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When granting a motion for remand, the Court "may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." 28 USC 1447 (c). The Ninth Circuit notes that a fee award under this statute "is not punative; it simply reimburses Plaintiff for 'wholly unnecessary litigation costs' inflicted by the defendants." Hofler v Aetna US Healthcare of Ca. 296 F3d 764 (9th Cir 2001) It is irrelevant if defendant's position on remand was "fairly supportable" and the question of whether or not to award fees "is within the discretion of the district court, and bad faith need not be demonstrated." Moore v Permanente Med Group Inc 981 F2d 443 (9th Cir. 1992) ///

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CONCLUSION

Defendants have provided no basis in fact or law allowing for the removal of this state action to the federal court. As such, for the reasons articulated above, this matter should be remanded back to the Orange County Superior Court.

Dated this 31st day of July, 2007

Attorney for Plaintiff Chriss Street

	POS-030				
ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address):	FOR COURT USE ONLY				
Phillip B. Greer SBN 96438	3				
1280 Bison Road B9-531					
Newport Beach, California	3 6				
	Co Co				
TELEPHONE NO.: 949 640 8911 FAX NO. (Optional):					
E-MAIL ADDRESS (Optional):					
ATTORNEY FOR (Name):					
SUNITED STATES DISTRICT COURT	and the second s				
CENTRAL DISTRICT OF CALIFORNIA	(A)				
- SOUTHERN DIVISION					
PETITIONER/PLAINTIFF: CHRISS STREET					
RESPONDENT/DEFENDANT: DANIEL HARROW, DOES 1 through 25, inclusive					
HICIUSIVE					
PROOF OF SERVICE BY FIRST-CLASS MAIL-CIVIL	SACV 07-829-JVS (ANz)				
(Do not use this Proof of Service to show service of a Summons a	and Complaint)				
<ol> <li>I am over 18 years of age and not a party to this action. I am a resident of or employed took place.</li> </ol>	in the county where the mailing				
2. My residence or business address is:					
1280 Bison Road B9-531					
Newport Beach, California 92660					
On (date): August 2, 2007 I mailed from (city and state): Newport Beach, California the following documents (specify):					
PLAINTIFFS NOTICE OF MOTION AND MOTION TO REMAND	•				
POINTS AND AUTHORITIES IN SUPPORT THEREOF	•				

a.	1	depositing the sealed envelope with the United States Postal Service with the postage fully prepaid.
b.		placing the envelope for collection and mailing following our ordinary business practices. I am readily familiar with this
		business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is
		placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in
		business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

The documents are listed in the Attachment to Proof of Service by First-Class Mail—Civil (Documents Served)

5. The envelope was addressed and mailed as follows:

4. I served the documents by enclosing them in an envelope and (check one):

- a. Name of person served: Scott E Blakeley
- b. Address of person served:

Blakeley & Blakeley

(form POS-030(D)).

1000 Quail Street suite 200

Newport Beach, California

92660

The name and address of each person to whom I mailed the	documents is listed in the .	Attachment to Proof of Service
 The hame and address of cash person to whom I make a the	decountering to noted in the	attackment to a rook of convict
by First-Class MailCivil (Persons Served) (POS-030(P)).	A	
DY 1"1131"C1033 WIDIF"-CIVII (F 0130113 301 V60) (F 03-030(F )).	// .	

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: August 2, 2007

Phillip B Greer (TYPE OR PRINT NAME OF PERSON COMPLETING THIS FORM)

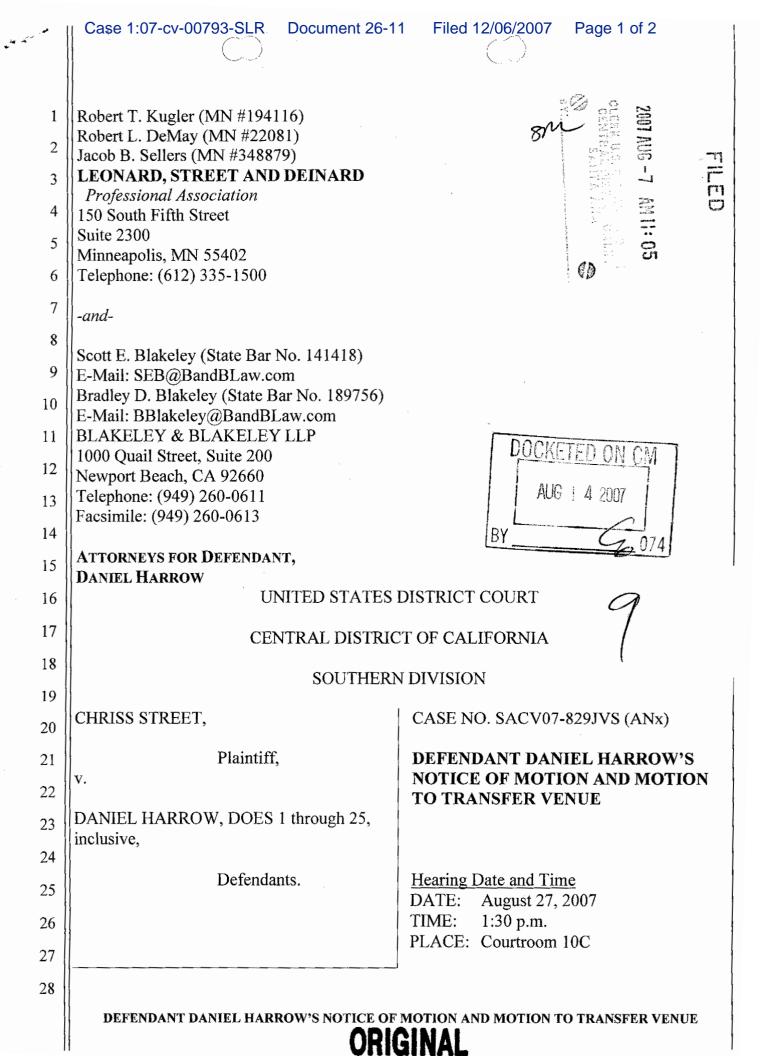
SIGNATURE OF PERSON COMPLETING THIS FORM)

Form Approved for Optional Use Judicial Council of California POS-030 [New January 1, 2005]

<sup>©</sup>Case 1:07-c0-00793-SER <sup>™</sup> Document 26-10 Filed 12/06/2007 Page 1 of 2\* ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bur number, and a Bradley D. Blakeley (State Bar # 189756) FOR COURT USE ONLY FHFD Blakeley & Blakeley LLP 1000 Quail Street, Suite 200
Newport Beach, CA 92660
TELEPHONE NO.: (949) 260-0611
FAX NO. (Optional): (949) 260-0613 E-MAIL ADDRESS (Optione) bblakeley@bandblaw.com ATTORNEY FOR (Name): Daniel Harrow, Defendant 2007 AUG -7 AM 11:07 STREET ADDRESS Central District of California MAILING ADDRESS: 411 W. Fourth Street, #1053 CITY AND ZIP CODE: Santa Ana 92701 BRANCH NAME: United States District Court PETITIONER/PLAINTIFF: Chriss Street RESPONDENT/DEFENDANT: Daniel Harrow CASE NUMBER: PROOF OF SERVICE-CIVIL SACV07-829JVS (ANx) Check method of service (only one): JUDGE: X By Personal Service By Mail By Overnight Delivery DEPT.: By Messenger Service By Facsimile By E-Mail/Electronic Transmission (Do not use this Proof of Service to show service of a Summons and Complaint.) 1. At the time of service I was over 18 years of age and not a party to this action. 2. My address is (specify one): a. X Business: 2005 Quail Street b. Residence: Newport Beach, CA 92660 August 6, 2007 3. On (date): I served the following documents (specify): DEFENDANT DANIEL HARROW'S NOTICE OF MOTION AND MOTION TO TRANSFER VENUE: DEFENDANT DANIEL HARROW'S MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO TRANSFER VENUE: AND DELCARATION OF JACOB B. SELLERS IN SUPPORT OF DEFENDANT'S MOTION TO TRANSFER VENUE The documents are listed in the Attachment to Proof of Service-Civil (Documents Served) (form POS-040(D)). 4. I served the documents on the persons below, as follows: a. Name of person served: Phillip B. Greer, Esq. b. Address of person served: 1280 Bison Road B9-531 Newport Beach, CA 92660 c. Fax number or e-mail address of person served, if service was by fax or e-mail: d. Time of service, if personal service was used: 2:00 p.m. The names, addresses, and other applicable information about the persons served is on the Attachment to Service—Civil (Persons Served) (form POS-040(P)). 5. The documents were served by the following means (specify): a. X By personal service. I personally delivered the documents to the persons at the addresses listed in item 4. (1) For a party represented by an attorney, delivery was made to the attorney or at the attorney's office by leaving the documents in an envelope or package clearly labeled to identify the attorney being served with a receptionist or an individual in charge of the office. (2) For a party, delivery was made to the party or by leaving the documents at the party's residence with some person not less than 18 years of age between the hours of eight in the morning and six in

the evening.

Filed 12/06/2007 Page 2 of 2 °Case⁵1:07~c⊽-00793-SER° Document 26-10 CASE NAME CASE NUMBER: SACV07-829JVS (ANx) Chriss Street v. Daniel Harrow By United States mail. I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses in item 4 and (specify one): deposited the sealed envelope with the United States Postal Service, with the postage fully prepaid. placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at (city and state): By overnight delivery. I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses in item 4. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier. By messenger service. I served the documents by placing them in an envelope or package addressed to the persons at the addresses listed in item 4 and providing them to a professional messenger service for service. (A declaration by the messenger must accompany this Proof of Service or be contained in the Declaration of Messenger below.) By fax transmission. Based on an agreement of the parties to accept service by fax transmission, I faxed the documents to the persons at the fax numbers listed in item 4. No error was reported by the fax machine that I used. A copy of the record of the fax transmission, which I printed out, is attached. By e-mail or electronic transmission. Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the documents to be sent to the persons at the e-mail addresses listed in item 4. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Date: August 6, 2007 Miguel Casas (If item 5d above is checked, the declaration below must be completed or a separate declaration from a messenger must be attached.) **DECLARATION OF MESSENGER** By personal service. I personally delivered the envelope or package received from the declarant above to the persons at the addresses listed in item 4. (1) For a party represented by an attorney, delivery was made to the attorney or at the attorney's office by leaving the documents in an envelope or package, which was clearly labeled to identify the attorney being served, with a receptionist or an Individual in charge of the office. (2) For a party, delivery was made to the party or by leaving the documents at the party's residence with some person not less than 18 years of age between the hours of eight in the morning and six in the evenina. At the time of service, I was over 18 years of age. I am not a party to the above-referenced legal proceeding. I served the envelope or package, as stated above, on (date): I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Date: (SIGNATURE OF DECLARANT) (NAME OF DECLARANT)



TO CHRISS STREET AND HIS ATTORNEY OF RECORD:

Page 2 of 2

PLEASE TAKE NOTICE THAT on August 27, 2007, at 1:30 p.m. in Courtroom 10C before the Honorable James V. Selna of the above entitled court, located at 411 West Fourth Street, Santa Ana, California, Defendant will and hereby move this Court for an Order transferring this action to the United States District Court for the District of Delaware. This motion is based on the fact that a transfer is in the interest of justice, convenient to the parties, and the entire subject of the complaint relates to a pending bankruptcy case.

PLEASE TAKE FURTHER NOTICE that pursuant to Local Rule 7-9 any opposition to the motion shall be in writing and shall be served upon Blakeley & Blakeley LLP at the address listed on the first page, upper left-hand column, and filed with the Court by the responding party not later than fourteen (14) calendar days prior to the hearing date. Opposition shall be accompanied by evidence establishing its factual allegations. Without good cause, no party shall be heard in opposition to the motion at oral argument if written opposition to the motion has not been timely filed.

This Motion is supported by this Notice, the accompanying Memorandum of Law, the Declaration of Jacob B. Sellers filed concurrently herewith, the court files in this action and any other matters or arguments as may be presented to the Court.

Dated: August 3, 2007

Respectfully submitted,

BLAKELEYÆBL*A*REI

Scott E. Blakeley

-and-

Robert T. Kugler (MN #194116) Robert L. DeMay (MN# 22081) Jacob B. Sellers (MN #348879)

ATTORNEYS FOR PLAINTIFFS DANIEL W. HARROW

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## INTRODUCTION

The *entire* subject matter of Plaintiff Chriss Street's ("Street") Complaint arises out of, and relates to, bankruptcy proceedings pending in the Bankruptcy Court for the District of Delaware. Plaintiff is the former trustee of The End of the Road Liquidating Trust (the "Trust"), replaced by Defendant Daniel Harrow (the "Successor Trustee"). There is a pending Chapter 11 adversary proceeding by the Successor Trustee against Street (the "Bankruptcy Action") involving the subject matter of this action pending in the Delaware Bankruptcy Court. One week before filing this action, Plaintiff filed his answer and counterclaim in that adversary proceeding. Instead of bringing his claims in this action with his counterclaim in the proper forum, the Delaware Bankruptcy Court, Street has elected to forum shop, resulting in duplicative litigation—contrary to the interest of both justice and judicial economy. Given these circumstances, this Court should transfer this action to the federal court handling the related proceedings in bankruptcy court.

# FACTUAL AND PROCEDURAL BACKGROUND

On October 7, 1996, the Fruehauf Trailer Corporation and certain of its subsidiaries (collectively the "Debtors") filed a voluntary petition under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court"). Street served as Chairman of the Board, President and CEO of the Debtors during the Chapter 11 case and was responsible for the formulation of the Debtors' Amended Joint Plan of Reorganization (the "Plan"). *See* Exhibit A to the Declaration of Jacob B. Sellers ("Sellers Dec.") at 1. The Plan was confirmed by the Bankruptcy Court on September 17, 1998 and was later amended on October 20, 1998. *See* Ex. B to Sellers Dec.

DEFENDANT DANIEL HARROW'S MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO TRANSFER VENUE

The sole purpose and intent of the Plan was the orderly and expedient liquidation of the Debtors' remaining assets for the benefit of the Debtors' approximately 4,100 creditors. As a vehicle to effectuate its purpose and intent, the Plan called for the creation of a liquidating trust. See Ex. A to Sellers Dec. at ¶ 6.1-6.6 and 1.41. Under the terms of the Plan, all of the Debtors' remaining assets were transferred to a trustee for liquidation and distribution of the proceeds to the creditor-beneficiaries. See id. at ¶ 6.1-6.6. The draft Liquidating Trust Agreement (the "Trust Agreement") was attached as an exhibit to the Plan. See Ex. C to Sellers Dec. The Plan indicated Street would be, and he in fact was, appointed trustee. See Ex. A to Sellers Dec. at ¶ 6.7

Street served as Trustee from October 27, 1998 until August 1, 2005. On or about August 1, 2005 Street was replaced in all capacities by Daniel W. Harrow (the "Successor Trustee"). The Consent Order removing Street as Trustee recognized the retention of all rights, claims and causes of action by the Successor Trustee against Street and provided that the Bankruptcy Court "shall retain jurisdiction over any matter related to this Order." *See* Ex. D to Sellers Dec. at ¶ 12.

On March 29, 2006, following the filing of the Successor Trustee's report on Street's tenure as trustee with the Bankruptcy Court, Street filed an action against the Successor Trustee in the California Superior Court, County of Orange, for defamation and conversion. On April 28, 2006, that action was removed to this Court and a motion to transfer venue to the Bankruptcy Court was filed. On the eve of the hearing on the motion to transfer venue and after he had won the election for election as the Orange County Treasurer, Street consequently dismissed the action. Thereafter, the Successor Trustee filed a motion for

sanctions against Street and his counsel and, although Judge Stotler denied the motion for sanctions, she admonished Plaintiff's counsel for his disregard for the Local Rules and the rules of professional responsibility. *See* Ex. E to Sellers Dec.

On January 9, 2007, Street filed a Petition for Advancement and Indemnification in the Court of Chancery of the State of Delaware against the Trust. *See* Ex. F to Sellers Dec. In his Petition, Street seeks advancement of fees and costs that include, ironically, fees and costs for the Department of Labor's investigation into transactions undertaken by Street in his capacity as trustee. *Id.* at ¶ 13. On February 2, 2007, Street's advancement and indemnification case was removed to the United States District Court for the District of Delaware and is currently pending on Street's motion for remand.

On February 2, 2007, after substantial investigation into Street's conduct while trustee, the Successor Trustee initiated an adversary proceeding (the "Adversary Proceeding") in the Bankruptcy Court to redress the serious damage Street wrought on the beneficiaries of the Trust. See Ex. G to Sellers Dec. at ¶ 1. The Adversary Proceeding, which is currently pending in Bankruptcy Court, seeks relief based on Street's multiple breaches of fiduciary duty, breaches of contract, fraud and conversion. See generally id. The complaint in the Adversary Proceeding alleges that Street utterly failed to fulfill his responsibility to efficiently and expeditiously liquidate the assets of the Trust, and thereby fulfill the purpose and intent of the Plan. Instead, over his seven-year tenure as trustee, Street routinely abused his position as trustee, transferring millions of dollars in Trust assets as a means to protect his interests and enrich himself. Id. at ¶¶ 1-163. Street's failure to fulfill his duties and obligations under the Plan, Trust Agreement and the fiduciary

relationship they created severely injured approximately 4,100 creditors of Fruehauf Trailer Corporation.

On June 22, 2007, Street moved to dismiss the Adversary Proceeding claiming that the Bankruptcy Court did not have subject-matter jurisdiction because the claims in that proceeding were state law claims based on post-confirmation conduct. In denying Street's motion to dismiss, the Bankruptcy Court held that Street's alleged misconduct occurred in the course of his duties as the central figure in the consummation of the Plan and administration of the estate of the Liquidating Trust and, therefore, it unquestionably had subject matter jurisdiction. Shortly thereafter, Street filed his answer and asserted a counterclaim in the Adversary Proceeding. Street's counterclaim seeks indemnification for, *inter alia*, his costs and expenses incurred in connection with the Successor Trustee's investigation of Street's conduct and Street's defense of the Adversary Proceeding. *See* Ex. H to Sellers Dec. at 29-30.

Less than three weeks after the Bankruptcy Court denied his motion to dismiss and ten days after he filed his counterclaim, Street filed this action. Although his position is far from clear, Street appears to seek damages from the Successor Trustee based on the Trust's fiduciary liability insurer's decision not to extend coverage to the Trust for the Department of Labor's investigation of transactions undertaken by Street while trustee. These transactions, which the insurer characterized as "self-dealing," are some of the very transactions at issue in the Adversary Proceeding.

## **ARGUMENT**

A matter venued in an improper jurisdiction shall be dismissed or, if it is in the interest of justice, transferred to any district in which it could have been brought. 28 U.S.C. § 1406(a). In addition, a district court has discretion to transfer any civil action to any district court in which the matter might have been brought when doing so would be in the convenience of parties or in the interest of justice. 28 U.S.C. § 1404(a). As fully set forth below, this matter should be transferred to the United States District Court for the District of Delaware (the "Delaware District Court") under either 1406(a) or 1404(a) for consolidation with the matter already pending in that Court.

- I. THIS MATTER SHOULD BE TRANSFERRED TO THE DELAWARE DISTRICT UNDER 1406(a) OR, ALTERNATIVELY, UNDER 1404(a).
  - A. THIS MATTER IS A CORE PROCEEDING WITHIN THE EXCLUSIVE JURISDICTION OF THE BANKRUPTCY COURT.

Proceedings "arising in a case under title 11" are referred to as core proceedings. *See 1 Collier on Bankruptcy*, P3.02[2], at 3-35 (15th ed. 2003). Congress vested bankruptcy courts with full and exclusive adjudicative power with regard to "core" proceedings. *See* 28 U.S.C. §§ 1334 and 157(a). A proceeding is core if it falls within the non-exhaustive list in 28 U.S.C. § 157(b) or invokes a substantive right provided by Title 11 or by its nature could arise only in the context of a bankruptcy case. *In re Gruntz*, 202 F.3d 1074, 1082 (9th Cir. 2000).

Although hard to follow, the allegations of Street's Complaint appear to boil down to this: the Successor Trustee, in fulfilling his duties and responsibilities as trustee, has deprived Street of a right he purportedly maintains by virtue of his status as the former

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trustee. Compl. at §§ 5 and 10. Despite the ambiguity of his allegations, one thing is clear Street's allegations directly concern the administration of the Trust, which is a the heart of the Plan. Therefore, this matter is a *core* bankruptcy proceeding.

In administering the Trust, the Successor Trustee is obligated to "take such actions as shall be necessary or advisable to preserve, maintain, and protect the Trust Estate." Ex. C to Sellers Dec. at § 7.1.2. In carrying out this responsibility, the Successor Trustee is afforded broad discretion, including the discretion to purchase and maintain such insurance as the Trustee deems reasonable, necessary, or appropriate to protect the Trust Estate. *Id.* at § 7.1.1. Exercising his discretion, the Successor Trustee acquired the fiduciary liability insurance and, at Street's request, submitted Street's application for insurance coverage to the insurer. Street's challenge to the Successor Trustee's exercise of rights and duties under the Trust Agreement and Plan, i.e. the acquisition and/or administration of fiduciary liability coverage for the trustee, directly concerns the "administration of the estate" and is, therefore, a "core proceeding" under 28 U.S.C. § 157. In alleging that the Successor Trustee engaged in conduct that deprived Street, as predecessor trustee, of coverage for the Department of Labor's investigation, Street seeks to charge Trust assets by reason of the Successor Trustee's alleged failure to perform his duties under the Trust Agreement and Plan. As the Bankruptcy Court has already stated, such matters are within the exclusive jurisdiction of the Bankruptcy Court. See In re Fruehauf, 2007 WL 1805078 at \*5 (Bankr. D. Del. June 22, 2007) (holding court's ability to supervise its appointed fiduciaries are with this

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jurisdiction); See also In re Southmark Corp., 163 F.3d 925 (5th Cir. 1999) (same) and In re

Coral Petroleum, Inc., 249 B.R. 721, 728 (Bankr. S.D. Tex. 2000) (same).

Street's allegation that he has been deprived of his right to coverage under the Trust's fiduciary liability insurance fares no better. The Trust's fiduciary liability insurance protects the Trust estate from liability for, inter alia, the actions of the trustee. In his capacity as trustee, and in that capacity alone, Street was afforded coverage under the Trust's fiduciary liability insurance. The Trust's fiduciary liability insurer has determined that there is as of yet no "claim" which could be covered by the policy, and the "[p]olicy would not afford coverage for any loss to Street or the Trust arising from the DOL Subpoena" because "the DOL suspects self-dealing by Street." See Ex. A to the Compl. at 1 and 3. Putting aside the issue of whether Street has a claim against the Successor Trustee for the insurer's decision, the deprivation of any right Street may have solely by virtue of his status as the former trustee concerns the "administration of the estate" and is, therefore, a "core proceeding." 28 U.S.C. § 157.

## В. THIS MATTER IS "RELATED TO" THE BANKRUPTCY PROCEEDING.

Under section 1404(a) a district court has discretion to transfer any civil action to any district court in which the matter might have been brought when doing so would serve the convenience of parties or in the interest of justice. 28 U.S.C. § 1404(a). Matters "related to a case under title 11 may be commenced in the district court in which such case is pending." 28 U.S.C. § 1409(a). This matter clearly could have been brought in the United States

A copy of In re Fruehauf, 2007 WL 1805078 (Bankr. D. Del. June 22, 2007) is attached to the Declaration of Jacob B. Sellers as Exhibit H.

District Court for the District of Delaware because it is "related to" the debtors' bankruptcy case currently pending in the bankruptcy court of the district.

After confirmation, bankruptcy courts continue to retain jurisdiction over matters that have "a close nexus to the bankruptcy plan or proceeding." In re Resorts Intern., 372 F.2d 154, 168-69 (3rd. Cir. 2004) (emphasis added). "Matters that affect the interpretation, implementation, consummation, execution, or administration of a confirmed plan or incorporated litigation trust agreement" have the requisite close nexus. Id. In proceedings involving continuing trusts, the nexus is significant. Id. at 165. Continuing trusts, such as the Liquidating Trust at issue here, "by their nature maintain a connection to the bankruptcy even after confirmation" because the trust "exists for the singular purpose of executing an order of the bankruptcy court." Id. The Ninth Circuit has adopted the Third Circuit's test for determining whether a proceeding is "related to" a bankruptcy case. See In re Pegasus Gold Corp., 394 F.3d 1189, 1193 (9th Cir. 2005).

The Bankruptcy Court has already determined that matters involving Street's conduct as trustee are, at a minimum, "related to" the Bankruptcy Case. See In re Fruehauf, 2007 WL 1805078. This matter is no different. The Department of Labor has investigated, and continues to investigate, transactions undertaken by Street while trustee. These transactions squandered millions of dollars in Trust and Fruehauf Retirement Plan assets. As the fiduciary liability insurer has pointed out, "the DOL suspects self-dealing by Street" and on that basis the insurer has denied coverage. Street's allegation that he is entitled to coverage under the Trust fiduciary liability policy and his challenge to the Successor Trustee's

performance of his duties under the Trust Agreement and Plan are undisputedly "related to" the Bankruptcy Case.

Moreover, transferring this case to the Delaware District Court serves the convenience of the parties and the interest of the justice. Ten days before he filed this action Street filed a counterclaim in the Adversary Proceeding seeking indemnification for, *inter alia*, his costs and expenses incurred in connection with the Successor Trustee's investigation and defending the Adversary Proceeding. As set forth above, the Adversary Proceeding seeks to recover damages from Street for his misconduct while trustee—misconduct which includes that transactions being investigated by the DOL.

In addition, as also fully set forth above, earlier this year Street filed a Petition for Advancement and Indemnification in the Court of Chancery of the State of Delaware against the Trust seeking advancement of costs for, *inter alia*, the same costs for which he seeks damages in the Complaint here—costs associated with the Department of Labor's investigation into transactions he undertook while trustee. On February 2, 2007, that case was removed to the United States District Court for the District of Delaware where it is currently pending on Street's motion for remand. The Successor Trustee expects that Street's motion for remand will be denied and the matter transferred to the Bankruptcy Court—the proper forum for all of these matters.

As practical matter, if this matter is not transferred, there is a substantial risk of inconsistent rulings between this Court and the Bankruptcy Court. It would be wasteful and duplicative to maintain parallel litigations across federal district courts involving and addressing the same subject matter. Judicial economy is served by transferring this matter to

the District of Delaware. The transfer serves judicial economy by putting the "related to" matter before the court with the power to transfer this matter to the Bankruptcy Court—the court with continuing and exclusive jurisdiction over the Trust, and the Court in which all of these matters should eventually be resolved. *See, e.g., Abramowitz v. Palmer*, 999 F.2d 1274, 1277 (8th Cir. 1993) (holding exercise of "related to" jurisdiction under Section 1334(b) "avoid[s] the inefficiencies of piecemeal adjudication and promote[s] judicial economy by aiding in the efficient and expeditious resolution of all matters connected to the debtor's estate").

## CONCLUSION

For the reasons discussed above, the Successor Trustee respectfully request that this Honorable Court transfer this action to the United States District Court for the District of Delaware.

Dated: August 3, 2007

Respectfully submitted,

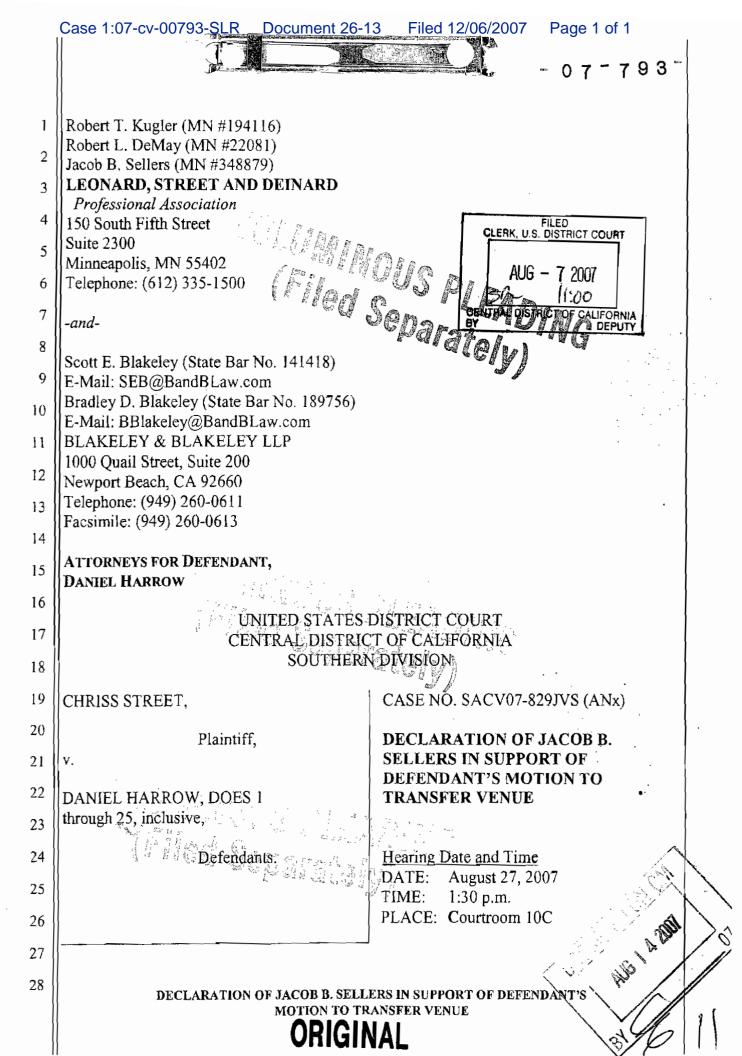
BLAKELE<del>X& BL</del>AKELEY LLP

Scott E. Blakeley

-and-

Robert T. Kugler (MN #194116) Robert L. DeMay (MN# 22081) Jacob B. Sellers (MN #348879)

ATTORNEYS FOR PLAINTIFFS DANIEL W. HARROW





CV-34 (06/07)

C& 61077cv400702951HS-RDocDorum26112

FILED - SOUTHERN DIVISION CLERK, U.S. D.STRICT COURT

AUG 1 5 2007
SDM 9:00
ENTRAL DISTRICT OF CALIFORNIA

# ORIGINAL

UNITED STATES DISTRICT COURT

CENTRAL DISTR	ICT OF CALIFORNIA		
CHRISS STREET	CASE NUMBER:		
Plaintiff(s), v.	SA CV 07-0829 JVS (ANx)		
DANIEL HARROW	ORDER RE TRANSFER PURSUANT TO GENERAL ORDER 07-02		
Defendant(s).	( Related Cases)		
СО	DNSENT		
I hereby consent to the transfer of the above-entitle AUG 13 2007	ed case to my calendar, parsuant to General Order 07-02.		
Date	United States District Judge		
DECI	LINATION		
I hereby decline to transfer the above-entitled case	to my calendar for the reasons set forth:		
Date	United States District Judge		
REASON FOR TRANSFER	AS INDICATED BY COUNSEL		
CaseSA CV 06-0425 AHS (RZx)	and the present case:		
<ul> <li>□ A. Arise from the same or closely related tran</li> <li>□ B. Call for determination of the same or subst</li> </ul>	nsactions, happenings or events; or tantially related or similar questions of law and fact; or		
☑C. For other reasons would entail substantial	duplication of labor if heard by different judges; or		
☐ D. involve the same patent, trademark or coppresent.	syright, and one of the factors identified above in a, b or c also is		
NOTICE TO COL	UNSEL FROM CLERK		
Pursuant to the above transfer, any discovery matters that	t are or may be referred to a Magistrate Judge are hereby transferred from		
Magistrate Judge Anthun Nahazata t	o Magistrate Judge <u>Ral Ph Zane 05 k Y</u> .		
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CV-34 (06/07) ORDER RE TRANSFER PURS	UANT TO GENERAL ORDER 07-02 (Related Cases) SDIM		

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AUG 2 2 2007

CENTRAL EXEMPTION OF CAR THE STATES OF CAREAUTY

# UNITED STATES DISTRICT COURT

# CENTRAL DISTRICT OF CALIFORNIA

### SOUTHERN DIVISION

11	CHRISS STREET,	) SA CV07-829-AHS(RZx)
12		ý
13	Plaintiff(s),	) ORDER TO PARTIES REQUIRING RUL: ) 26(f) REPORT TO BE FILED NO LATE: ) THAN NOVEMBER 5, 2007
14	v.	) ON ON
15	DANIEL HARROW, et al.,	)   DCCKETED CW CM
16		} AUG 22 2007
17	Defendant(s).	$\frac{1}{100}$

All cases, except those exempted by the local rules or statute, shall be governed by a Scheduling Order to be issued as required under Fed. R. Civ. P. 16(b).

IT IS ORDERED, therefore, that all parties and counsel shall meet their obligations to disclose information, confer on a discovery plan, and file a report to the Court, as required by Fed. R. Civ. P. 26 (f) no later than November 5, 2007. Failure to comply with this Order may result in the imposition of sanctions.

Based on the pleadings and the parties' Rule 26(f) Report, the Court will issue a Scheduling Order without convening a Scheduling Conference.

1 | The parties are referred to Fed. R. Civ. P. 26(f) and Local Rule 26-1 for the specific contents of the report. The parties shall include in the joint report a factual summary or analysis of the case. IT IS FURTHER ORDERED that all counsel and parties appearing pro se must be familiar with the Federal Rules of Civil Procedure and the Local Rules of the Central District of California. Obligations of "counsel" in this Order also include obligations of parties appearing pro se, unless otherwise expressly excluded. IT IS SO ORDERED. Dated: August 22, 2007. ALICEMARIE H. STOTLER CHIEF U. S. DISTRICT COURT JUDGE Courtroom Deputy Clerk for Judge Stotler: Telephone No. (714) 338-4758 

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# UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA CIVIL MINUTES - GENERAL

Date: August 22, 2007

Case Title: CHRISS STREET v. DANIEL HARROW, et al.

PRESENT: THE HONORABLE ALICEMARIE H. STOTLER, CHIEF U.S. DISTRICT JUDGE

Ellen Matheson

Case No.: <u>SA CV 07-829-AHS(RZx)</u>

<u>None</u>

Courtroom Deputy

Court Reporter

ATTORNEY(S) PRESENT FOR PLAINTIFF(S):

None Present

ATTORNEY(S) PRESENT FOR DEFENDANT(S):

None Present

PROCEEDINGS: (IN CHAMBERS) ORDER CONTINUING DEFENDANT'S

MOTION TO TRANSFER VENUE

This matter has been transferred for all further proceedings, pursuant to General Order 07-02, from the Hon. James V. Selna, to the calendar of Chief Judge Alicemarie H. Stotler, Santa Ana Courthouse, Courtroom 10A, 411 West Fourth Street, Santa Ana, California.

On the Court's own motion, Defendant Daniel Harrrow's Notice of Motion and Motion to Transfer Venue originally scheduled for August 27, 2007, is continued to September 24, 2007, at 10:00 a.m.

Initials of Deputy Clerk:

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Page 1 of 1

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	PLAINTIFF(S), v.	
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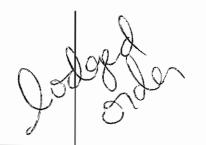
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	DISTRICT COURT CT OF CALIFORNIA
Chriss Street  PLAINTIFF(S),	CASE NUMBER  CASE NUMBER  SACV 07-829 AHS
Daniel Harrow  DEFENDANT(S),	NOTICE OF CLERICAL ERROR
TO: U. S. District Judge(s) U. S. Magistrate Judge(s) Counsel of Record	
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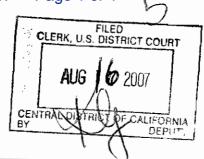
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Filed 12/06/2007 7 Page 4 of 4

Robert T. Kugler Leonard, Street and Deinard 150 South Fifth Street, Suite 2300 Minneapolis, Minnesota 55402 Tel: (612) 335-1500

G-64 (06/05)





# UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA

CHRISS STREET,		CASE NUMBER SACV07-	-829JVS (ANx)
v.	Plaintiff(s)		
DANIEL HARROW, DOES 1 through 2 inclusive,	Defendant(s).		N-RESIDENT ATTORNEY A SPECIFIC CASE
NOTICE: Effective June 1, 2004, the fee for the fee with your application. Pur for attorneys for the United State Clerk. If no Appointment Affida To receive orders and judgeme (G-76), available on the court's	rsuant to Local Ri es, its departmen wit is on file, sub onts by e-mail, co	ule 83-2.4, submission of this ts and agencies with Appoint mission of the application is complete and return the Option	application and the fee is waived the ment Affidavits on file with the required.
I, <u>Robert T. Kugler</u> for permission to appear and participate in th	e above entitled	, hereby apply to the Cou	urt under Local Rule 83-2.8.2
		whom I have been retained.	in El Defendant.
My out-of-state business information is as fo			
	Leonard, Stree	t and Deinard Name	
15	50 South Fifth S	Street, Suite 2300	
Minneapolis, Minnesota 55		et Address robert.kugl	ler@leonard.com
City, State, Zip		E-Ma	il Address
(612) 335-1 Telephone Nu		(612) 335-1657 Fax Number	
I am a member in good standing and eligible	to practice befor	e the following courts:	
	of Court		Date of Admission 10/28/1988
Northern District of California			08/31/1993
Wisconsin			05/21/1996
I am not a resident of, nor am I regularly emp California. I am not currently suspended or d		- <b>-</b>	ther activities in the State of

PAID

APPLICATION OF NON-RESIDENT ATTORNEY TO APPEAR IN A SPECIFIC CASE

CLERK U.S. DEWEST COURT

AUG 1 7 2007

I have concurrently, or within three ( following actions: Case Number	(3) years of this application  Title of Action		Application	o this Court in the  Application
SACV06425AHS(RZx)	Chriss Street v. Harrow			Granted or Denied 5/23/2006
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	State, Zip 2) 260-0611	(949) 260-		iil Address
	phone Number	Fax Num		
who is a member in good standing of the practice of law, as the attorney we conduct of this case, and upon whom I declare under penalty of perjury that Local Criminal Rules, the F.R. Civ. I	ith whom the Court and op papers may be served. It the foregoing is true and	posing counsel may recorrect and that I am	eadily commu	inicate regarding the
Dated August 13, 2007		Robert T. Kugler		
Bulleti - B		Applicant's Name (pl	ease print)	
		Applicant's Signature		hr _
hereby consent to the foregoing des	ignation as local counsel.	1	$\bigcap$	
Dated <u>August</u> 13, 2007		Scott E. Blakeley Designed And Wille	and prifit)	
		Lesigned's Signature		
		State Bar No. 141 Designee's California		ber
	( )	/ D SUBMIT A COMPLI		

WITH THIS APPLICATION.

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# DECLARATION OF SERVICE

The undersigned certifies and declares as follows:

I am employed in the City of Newport Beach and County of Orange, in the State of California. I am over the age of 18 and not a party to the within action. I am employed by Blakeley & Blakeley LLP, whose business address is 1000 Quail Street, Suite 200, Newport Beach, California 92660.

On August 15, 2007, I served the forgoing document described as:

# APPLICATION OF NON-RESIDENT ATTORNEY TO APPEAR IN A SPECIFIC CASE

on the interested parties in this action [X] by placing [] the original [X] a true copy thereof enclosed in sealed envelopes, with postage fully prepaid, addressed as follows:

# SEE ATTACHED SERVICE LIST

By U.S. Mail [X]

I am readily familiar with Blakeley & Blakeley's practice of collecting and processing [X]correspondence for mailing via U.S. Mail. Correspondence so collected and processed is deposited with the United States Postal Service that same day in the ordinary course of business. that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit of mailing in declaration

I declare under penalty of perjury under the laws of the United States of America that [X]the foregoing is true and correct. Executed on August 15, 2007, at Newport Beach, California.

# **SERVICE LIST**

COUNSEL FOR PLAINTIFF
Phillip B. Greer, Esq.
LAW OFFICES OF PHILLIP B. GREER 1280 Bison Road B9-531 Newport Beach, CA 92660

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	Defendant(s).		
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The Court, having reviewed	the accompanying A	Application of	Robert T. Kugler,
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action on behalf of   Plaintiff	X Defendant	Daniel Harrow	
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and the designation of Scott		Blakeley & B	
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# Filled 0/82/220077 Page 4 of of

# UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA CIVIL MINUTES - GENERAL



Case No.: <u>SA CV 07-829-AHS(RZx)</u>

Date: August 28, 2007

Case Title: CHRISS STREET v. DANIEL HARROW, et al.

PRESENT: THE HONORABLE ALICEMARIE H. STOTLER, CHIEF U.S. DISTRICT JUDGE

Ellen Matheson

None

Courtroom Deputy

Court Reporter

ATTORNEY(S) PRESENT FOR PLAINTIFF(S):

None Present

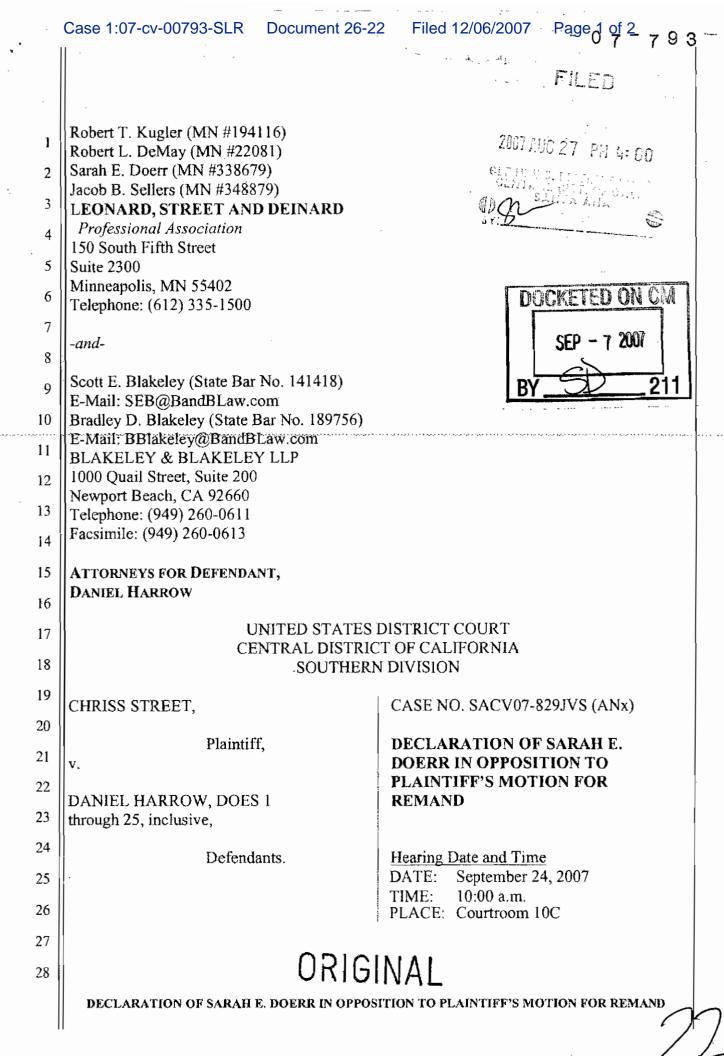
ATTORNEY(S) PRESENT FOR DEFENDANT(S):

None Present

PROCEEDINGS: (IN CHAMBERS) ORDER CONTINUING HEARING ON PLAINTIFF'S MOTION TO REMAND CASE TO STATE COURT

On the Court's own motion, plaintiff's motion to remand case to state court originally scheduled for September 10, 2007, at 1:30 p.m., in Courtroom 10C, is continued and will be heard on September 24, 2007, at 10:00 a.m., in Courtroom 10A.

Initials of Deputy Clerk:



Sarah E. Doerr declares and states as follows:

- I am an attorney with the law firm of Leonard, Street and Deinard, Professional 1. Association, and one of the attorneys representing Defendant Daniel Harrow in the above captioned matter. I make this declaration in support of Defendant's Opposition to Plaintiff's Motion For Remand.
- Attached hereto as "Exhibit A" is a true and correct copy of the Trust 2. Employment Agreement.

Dated: August 27, 2007

### EMPLOYMENT AGREEMENT

EMPLOYMENT AGREEMENT (the "Agreement") made as of October 27, 1998 between THE END OF THE ROAD TRUST, Chriss W. Street, Trustee (the "Trust"), a trust created under a trust agreement dated as of October 27, 1998 ("Trust Agreement"), with its principal offices located at 1111 Bayside Drive, Suite 160, Corona del Mar, California 92625, and CHRISS W. STREET, an individual with offices located at 1111 Bayside Drive, Suite 160, Corona Del Mar, California 92625 ("Street").

## WITNESSETH:

WHEREAS, Fruehauf Trailer Corporation, a Delaware corporation ("Fruehauf Trailer"), and certain of its direct and indirect subsidiaries (collectively, the "Debtors") filed petitions for relief under Chapter 11 of the U.S. Bankruptcy Code on October 7, 1996 and have operated as debtors in possession from that date through the date hereof;

WHEREAS, the Amended Joint Plan of Reorganization filed by the Debtors with the U.S. Bankruptcy Court for the District of Delaware (the "Bankruptcy Court") on July 28, 1998, as amended by the Amended First Modifications to Debtors' Amended Joint Plan of Reorganization dated September 17, 1998 and further amended by an order of the Bankruptcy Court dated October 20, 1998 (collectively, the "Plan"), became effective on October 27, 1998 (the "Effective Date");

WHEREAS, pursuant to the Plan the Trust has been established as a liquidating trust for the benefit of certain creditors of the Debtors as of the Effective Date, including as the principal beneficiaries of the Trust persons and entities holding certain Series A Senior Secured Notes of Fruehauf Trailer (the "Senior Notes") in the aggregate principal amount of \$54,505,000 as of the Effective Date of the Plan, to hold and liquidate assets of the Debtors which have been transferred to the Trust as of the Effective Date;

WHEREAS, also pursuant to the Plan certain securities of Wabash National Corporation ("Wabash") registered in the name of Fruehauf Trailer will be distributed directly to the holders of the Senior Notes shortly following the Effective Date and the remaining assets of the Debtors will be transferred to the Trust; and

WHEREAS, Street has served as Chairman of the Board and President of Fruehauf Trailer since April 1997 and has agreed to serve as trustee of the Trust pursuant to the terms of the Trust Agreement and the terms and conditions of this Agreement.

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Filed 12/06/2007

NOW, THEREPORE, in consideration of the foregoing premises and the covenants and agreements hereinafter set forth, the parties hereto agree as follows:

- 1. Appointment as Trustee: Term. Street is hereby constituted and appointed as trustee of the Trust and hereby agrees to serve as trustee of the Trust and assume the duties and powers of the trustee for an initial term commencing on the Effective Date and continuing until the earlier of the third anniversary of the Effective Date and the dissolution of the Trust. If the Trust has not been dissolved prior to the third anniversary of the Effective Date, the term of this Agreement shall be automatically renewed for an additional one year term (subject to earlier termination in the event of dissolution of the Trust prior to the end of the renewal term) and shall continue to be renewed for additional one year terms on each succeeding anniversary of the Effective Date until dissolution of the Trust; provided, however, that this Agreement shall not be renewed beyond the initial three year term or any one year renewal term, if applicable, if the Trust Advisory Committee (as defined in the Trust Agreement) notifies Street in writing at least 90 days prior to the end of the applicable term that the Trust will not renew this Agreement at the end of the then current term.
- 2. Power and Authority. Street, as trustee, shall have such authority and powers as shall be vested in him by the Trust Agreement and by further order of the Bankruptcy Court in the bankruptcy proceeding relating to the Debtors. In furtherance of such powers, Street shall be entitled to employ or retain such employees, advisers, agents (including but not limited disbursing agents), counsel, accountants and consultants as he deems necessary and appropriate to manage the affairs of the Trust on such terms and conditions as he deems appropriate, and the compensation paid or to be paid to such persons for services rendered to the Trust or to Street in his capacity as trustee shall be a cost and expense of the Trust. The Trust hereby acknowledges that Street will initially employ Worth Frederick and Courtney Watson as employees of the Trust at initial salaries of \$20,000 per annum and \$65,000 per annum, respectively. So long as Street is serving as trustee, no co-trustee will be appointed without Street's prior written consent.
- 3. Compensation as Trustee. For serving as trustee of the Trust, Street shall receive the following compensation:
- (a) An annual fee of \$200,000 (the "Annual Fee"), payable in semi-monthly installments during each year of the initial term and any renewal term.
- (b) In addition to the Annual Fee, Street shall receive a bonus ("Percentage Fee") equal to 12.5% of the value, in excess of the aggregate principal amount of the Senior Notes outstanding on the Effective Date (such principal amount hereinafter referred to as the "Par Amount"), of all assets which are distributed to the holders of the Senior Notes pursuant to

the Plan, either directly by Fruehauf Trailer or by the Trust, calculated on a cumulative basis from and after the Effective Date; provided, however, that if the assets distributed prior to the first anniversary of the Effective Date have a value equal to or in excess of the Par Amount, the Percentage Fee payable to Street will be equal to 15% of the value of the assets distributed in excess of the Par Amount. For purposes of determining the value of assets distributed to the holders of the Senior Notes pursuant to the Plan and calculation of the Percentage Fee, the following shall apply:

- The value of shares of Common Stock of Wabash ("Common Stock") (i) distributed to the holders of the Senior Notes will be equal to the higher of (A) the average of the closing sale prices of the Common Stock as reported by the New York Stock Exchange for the 10 consecutive trading days immediately prior to the date (which shall not be any earlier than the Effective Date) which Fruehauf Trailer establishes as the record date for determining the holders of the Senior Notes who will be entitled to receive the shares of Common Stock to be distributed to such holders (the "Distribution Record Date") and (B) the average of the daily closing sale prices of the Common Stock as reported by the New York Stock Exchange for the period of 90 days following the date on which the certificates representing the Common Stock are first delivered to the holders of the Senior Notes (the "Distribution Date") (the higher of (A) or (B) being referred to as the "Average Price"). No other change in the market price of the Common Stock will be given any effect in calculating the value of the Common Stock distributed to the holders of the Senior Notes.
- The value of the shares of Series B 6% Cumulative Convertible (ii) Exchangeable Preferred Stock of Wabash (the "Preferred Stock") distributed to the holders of the Senior Notes will be equal to the product of (A) and (B), where (A) is the result obtained by dividing the sum of \$17,600,000 plus the proportionate amount, calculated through the Distribution Date, of the dividends paid in respect of the Preferred Stock on the first dividend payment date following the Distribution Date, by the conversion price of the Preferred Stock (i.e. \$21,375, subject to anti-dilution adjustments) and (B) is the Average Price. No other change in the market price of the Common Stock will be given any effect in calculating the value of the Preferred Stock distributed to the holders of the Scalor Notes.
- The value of all other assets distributed to the holders of the Senior Notes (iii) shall be fair market value of such assets on the respective dates of distribution, which fair market value shall be determined by mutual

agreement of Street and the Trust Advisory Committee, except if no such agreement is reached, fair market value shall be determined by an independent appraiser whose selection will be mutually agreed upon by Street and the Trust Advisory Committee.

- (c) The determination of the cumulative value of assets distributed to the holders of Senior Notes pursuant to the Plan shall be made on a quarterly basis as of the close of business on the last day of each calendar quarter, commencing with the quarter ending December 31, 1998, except that if the value of assets distributed to the holders of the Senior Notes on or before September 30, 1999 (i.e., the last day of the calendar quarter immediately preceding the first anniversary of the Effective Date) has not equaled or exceeded the Par Amount, a determination shall also be made as of the close of business on the day prior to first anniversary of the Effective Date to determine whether the cumulative value of the assets distributed on or before that date equals or exceeds the Par Amount. The Percentage Fee, if any, payable to Street in respect of any calendar quarter shall be paid within thirty days following the last day of such quarter.
- (d) Except as provided in subparagraph (i) and (ii) of paragraph (b) above; in the event that an asset is distributed in kind, it shall be valued on the date of distribution and no subsequent change in value will be given effect in determining the value of such asset for purposes of determining the cumulative value of assets distributed to holders of Senior Notes.

## 4. Termination as Trustee.

(a) In the event Street ceases to serve as trustee prior to the end of the initial term or any renewal term for any reason other than as a result of termination for Cause (as ... hereinafter defined), Permanent Disability (as hereinafter defined), death or voluntary resignation, he shall continue to receive the Annual Fee that is payable for the remainder of the applicable term. In addition, in the event of such termination and the amount distributed to the holders of the Senior Notes prior to the date of termination has equaled or exceeded the Par Amount, Street will continue to be entitled to receive the Percentage Fee (if any) for a period of two years following the date on which he ceases to serve as trustee; provided, however, that if, as of the date on which Street ceases to serve as trustee, an amount equal to or greater than 90% but less than 100% of the Par Amount has been distributed to the holders of the Senior Notes and within one year following such date the cumulative amount distributed to the holders exceeds 100% of the Par Amount, Street will be entitled to receive the Percentage Fee on amounts distributed to the holders in excess of the Par Amount within 18 months after the date he ceases to serve as trustee and, provided, further, that if Street is terminated as trustee at any time prior to the first anniversary of the Effective Date other than for Cause, Street will be entitled to receive the Annual Fee and Percentage Fee (if any) until

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the third anniversary of the Effective Date irrespective of the cumulative amount which has been distributed to the holders of the Senior Notes on the date of termination. Upon Street's death or termination as trustee as a result of a Permanent Disability during the initial or any renewal term, Street (or his heirs, as the case may by) shall be entitled to receive the Annual Fee and Percentage Fee (if any) for a period of one year following the date on which he ceases to serve as trustee. The Trust shall be authorized to obtain insurance to cover the amount owed to Mr. Street in the event of death or termination as a result of Permanent Disability and Street agrees to submit to a physical or such other test as may be required to obtain such insurance. If Street is terminated as trustee either for Cause or ceases to serve as trustee as a result of a voluntary resignation, Street shall be entitled to the Annual Fee and Percentage Fee (if any) through the date of termination. For purposes of this paragraph (a) only, any cash received by the Trust from and after the date on which Street ceases to serve as trustee shall, for purposes of calculation of the Percentage Fee, be deemed to have been distributed to the beneficiaries of the Trust.

Document 26-23

- (b) For purposes of this Section 4, the following definitions shall apply:
- (i) "Cause" shall mean Street shall have either (A) been engaged in an act of fraud or dishonesty against the Trust, (B) been convicted of, or entered a pleas of nolo contendre to, a felony or a misdemeanor involving moral turpitude under the laws of the United States or any state thereof, (C) admitted or been found by a court of law to have been involved in either the distribution, possession or use of illegal drugs or (D) knowingly violated in a material way any policy maintained by the Trust.
  - (ii) "Permanent Disability" shall mean that Street, as a result of an incapacity due to physical or mental illness, has been unable to perform the duties of trustee for a period of not less than 90 consecutive days and, within 30 days of notice of termination being sent to him by the Trustee Advisory Committee based on such incapacity, shall have failed to return to the performance of his duties at trustee.
- (c) The Trust and Street agree that it is impossible to determine with any reasonable accuracy the amount of prospective damages that would be incurred by Street in the event of his termination as trustee of the Trust before the end of any applicable term of this Agreement and the parties further agree that, based upon the facts and circumstances of the parties at the time of entering this Agreement and with due regard to future expectations, amounts payable to Street pursuant to this Section 4 are in the nature of liquidated damages and are not a penalty.

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5. Indemnification. In addition to any right of indemnification which may be available to Street pursuant to the Trust Agreement, the Trust hereby agrees to indemnify Street for all liabilities (including, without limitation, judgements, fines, settlement payments, losses, damages, costs and expenses, including attorneys' fees) incurred by Street in connection with any action, suit, proceeding or investigation arising out of or relating to the performance by Street of services for, or acting as trustee or in any other capacity on behalf of the Trust, so long as Street acted in good faith and in a manner reasonably believed to be in or not opposed to the best interests of the Trust and, with respect to any criminal action or proceeding, had no reasonable cause to believe his conduct was unlawful. Expenses (including attorney's fees) incurred by Street in defending any civil, criminal, administrative or investigative action, suit or proceeding shall be paid by the Trust in advance of the final disposition of such action, suit or proceeding upon receipt of an undertaking by Street to repay such amount if it shall ultimately be determined, by a court of competent jurisdiction, that Street is not entitled to be indemnified by the Trust as provided in this Section 5. The Trust hereby agrees, during the term of this Agreement, to maintain fiduciary liability insurance on behalf of Street in such amounts às Street deems reasonable.

## 6. Miscellaneous.

- (a) The Trust acknowledges that Street will be employed by, or perform services on behalf of, other persons and entities during the term of this Agreement and that he shall only be required to devote as much of his business time as he, in his sole discretion, reasonably deems necessary to perform his duties as trustee.
- (b) The Trust acknowledges that Street will be entitled to perform his duties as trustee at such location as he deems appropriate. Street shall be entitled, on behalf of the Trust, to procure such office space and arrange for such secretarial and/or administrative assistance, office supplies, support services and such other facilities and services as he deems reasonable necessary for the performance of his services as trustee, the cost of which shall be borne by the Trust Estate. All reasonable and customary expenses incurred by Street in the performance of his duties as trustee, including but not limited to entertainment and travel expenses, shall be promptly reimbursed to him by the Trust. Street shall also be entitled to participate in all fringe benefits, including but not limited to medical insurance coverage. which the Trust may offer to its employees generally.
- (c) No amounts paid to Street by any of the Debtors prior to, on or following the Effective Date, including but not limited to the confirmation bonus of \$350,000 paid to Street as described in the Disclosure Statement concerning the Plan, shall be deemed in satisfaction of, or credited against, any amount to be paid to Street pursuant to this Agreement.

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- (d) This Agreement and all rights of Street hercunder shall inure to the benefit of and be enforceable by Street's personal or legal representatives, executors, administrators, successors, heirs, distributees, devisees and legatees. If Street should die while any amounts would still be payable to him hereunder if he had continued to live, all such amounts shall be paid in accordance with the terms of this Agreement to Street's devisee, legatee or other designee or, if there be no such designee, to Street's estate.
- (e) For purposes of this Agreement, notices, demands and all other communications provided for in this Agreement shall be in writing and shall be deemed to have been duly given when delivered or (unless otherwise specified) mailed by United States certified or registered mail, return receipt requested, postage prepaid, to the addresses set forth on the first page hereof or to such other address as either party may have furnished to the other in writing in accordance herewith, except that notices of change of address shall be effective only upon receipt.
- (f) No provisions of this Agreement may be modified, waived or discharged unless such waiver, modification or discharge is agreed to in writing signed by Street and a member of the Trust Advisory Committee on behalf of the Trust. No waiver by either party hereto at anytime of any breach by the other party hereto of, or compliance with, any condition or provision of this Agreement to be performed by such other party shall be deemed a waiver of similar or dissimilar provisions or conditions at the same or at any prior or subsequent time. No agreements or representations, oral or otherwise, express or implied, with respect to the subject matter hereof have been made by either party which are not set forth expressly in this Agreement. The validity, interpretation, construction and performance of this Agreement shall be governed by the laws of the State of Delaware without regard to its conflicts of law principals.
- (g) The invalidity or unenforceability of any provisions or provisions of this Agreement shall not affect the validity or enforceability of any other provisions of this Agreement, which shall remain in full force and effect.
- (h) This Agreement may be executed in one or more counterparts, each of which shall be deemed to be an original but all of which together will constitute one and the same instrument.
- (i) Any dispute or controversy arising under or in connection with this Agreement shall be settled exclusively by the Bankruptcy Court.
- (i) This Agreement sets forth the entire agreement of the parties hereto in respect to the subject matter contained herein and supersedes any and all other prior agreements,

promises, covenants, arrangements, communications, representations or warranties, whether oral or written, by and officer, employee or representative of any party hereto, and any prior agreement of the parties hereto in respect of the subject matter contained herein is hereby terminated and canceled.

IN WITNESS WHEREOF, the parties hereto have entered this Agreement as of the date first above written.

THE END OF THE ROAD TRUST

Nama

Title: As Tousdoc

Chriss W Street

# STATE OF CALIFORNIA, COUNTY OF ORANGE

The undersigned certifies and declares as follows:

I am employed in the City of Newport Beach and County of Orange, in the State of California. I am over the age of 18 and not a party to the within action. I am employed by Blakeley & Blakeley LLP, whose business address is 1000 Quail Street, Suite 200, Newport Beach, California 92660.

On August 27, 2007, I served the forgoing document described as:

# DECLARATION OF SARAH E. DOERR IN OPPOSITION TO PLAINTIFF'S MOTION FOR REMAND

on the interested parties in this action [X] by placing [] the original [X] a true copy thereof enclosed in sealed envelopes addressed as follows:

## SEE ATTACHED SERVICE LIST

# [X] BY FEDERAL EXPRESS

[X] I deposited such envelope in a Federal Express drop box or other facility maintained by Federal Express at Newport Beach, California. The envelope was mailed with postage thereon fully prepaid.

[X] I am "readily familiar" with the firm's practice of collecting and processing correspondence for overnight mailing. Under that practice the envelope would be deposited with Federal Express on that same day with postage thereon fully prepaid at Newport Beach, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit of mailing in affidavit.

[X] I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed on August 27, 2007, at Newport Beach, California.

Shirley Chen

# **SERVICE LIST**

# **COUNSEL FOR PLAINTIFF**

Phillip B. Greer, Esq.
LAW OFFICES OF PHILLIP B. GREER
1280 Bison Road B9-531
Newport Beach, CA 92660

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# **INTRODUCTION**

The Complaint of Plaintiff Chriss Street ("Street") in the Superior Court of California
alleges that, by reason of Street's status as former trustee of the End of the Road Trust
("Trust")—an asset-liquidation trust established under the Chapter 11 Plan in the Fruehauf
Trailer Corporation bankruptcy—the Trust's fiduciary insurance provider must provide him
a defense for a Department of Labor investigation into Street's self-dealing while, as Trustee
of the Trust, he managed the Fruehauf Trailer Corporation Retirement Plan. Street alleges
that the refusal of the Trust's insurer to provide this defense is attributable to something
Daniel Harrow, in his capacity as the successor and current Trustee of the Trust, either did or
didn't communicate to the insurer. Street argues that his claims do not invoke bankruptcy
jurisdiction or, if they do, 28 U.S.C. § 1334(c) mandates federal abstention and, therefore, a
remand of this action. Street's arguments are meritless. Both the right Street purports to
invoke and the duty the defendant is alleged to have breached arise, if at all, solely out of
status as either a former or current trustee, over which the Bankruptcy Court has necessarily
retained broad jurisdiction. See In re Fruehauf, 2007 WL 1805078 (Bankr. D. Del., June 22,
2007). For the reasons set forth below, the abstention provisions in Section 1334(c) have
absolutely no application, and the nexus between Plaintiff's purported action and the
liquidating trust established to carry out the Fruehauf Bankruptcy Plan is more than
sufficient to establish this Court's original jurisdiction under 28 U.S.C. § 1334(b).

# FACTUAL AND PROCEDURAL BACKGROUND

On October 7, 1996, the Fruehauf Trailer Corporation and certain of its subsidiaries (collectively the "Debtors") filed a voluntary petition under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court"). Street served as Chairman of the Board, President and CEO of the Debtors during the Chapter 11 case and was responsible for the formulation of the Debtors' Amended Joint Plan of Reorganization (the "Plan"). See D.I. 10 at 1; D.I. 11 Ex. A. The Plan was confirmed by the Bankruptcy Court on September 17, 1998 and was later amended on October 20, 1998. See D.I. 11 Ex. B. Intending that the Bankruptcy Court would retain jurisdiction over matters involving the implementation and administration of the Plan, the Plan employed broad retention-of-jurisdiction language. See Plan at 23.

The purpose and intent of the Plan was the orderly and expedient liquidation of the Debtors' remaining assets for the benefit of the Debtors' approximately 4,100 creditors. As a vehicle to effectuate its purpose and intent, the Plan called for the creation of a liquidating trust and indicated that Street would be, and he in fact was, appointed trustee. *See* Ex. C to D.I. 9 at ¶¶ 6.1-6.6 and 1.41. Under the terms of the Plan, all of the Debtors' remaining assets were transferred to the trustee for liquidation and distribution of the proceeds to the creditor-beneficiaries. *See id.* at ¶¶ 6.1-6.6. The draft Liquidating Trust Agreement (the "Trust Agreement") was attached as an exhibit to the Plan. *See* Ex. B. to Plan.

Sometime after the creation of the Trust, Street executed an employment agreement with the Trust (the "Trust Employment Agreement") for his services as trustee. Declaration of Sarah E. Doerr in Opposition to Plaintiff's Motion to Remand ("Doerr Decl."), Ex. A at 1.

The Trust Employment Agreement was drafted solely by Street and was executed by Street both (i) in his capacity as Trustee of the Trust and (ii) individually as the employee. *Id.* at 8. The Trust Employment Agreement provides that "[a]ny dispute or controversy arising under or in connection with this Agreement shall be settled exclusively in the Bankruptcy Court." *Id.* at 7.

Street served as Trustee from October 27, 1998 until August 1, 2005. On or about August 1, 2005 Street was replaced in all capacities by Daniel W. Harrow (the "Successor Trustee"). In the Consent Order removing Street as trustee, Street agreed that the Bankruptcy Court "shall retain jurisdiction over any matter related to this Order." *See* D.I. 11 Ex. D at ¶ 12.

On March 29, 2006, following the filing with the Bankruptcy Court of the Successor Trustee's report on the status of the Trust (including an analysis of Street's tenure as trustee), Street filed an action against the Successor Trustee in the California Superior Court, County of Orange, for defamation and conversion. On April 28, 2006, that action was removed to this Court and a motion to transfer venue to the Bankruptcy Court was filed. On the eve of the hearing on the motion to transfer venue and after he had won the election for Orange County Treasurer, Street dismissed the action. Thereafter, the Successor Trustee filed a motion for sanctions against Street and his counsel, which was ultimately denied, but not without this Court admonishing Street's counsel for his disregard for the Local Rules and the rules of professional responsibility. *See* D.I. 11 Ex. E at 11.

On January 9, 2007, Street filed a Petition for Advancement and Indemnification in the Court of Chancery of the State of Delaware (the "Petition") against the Trust. See D.I. 11

Ex. F. In the Petition, Street seeks advancement of fees and costs, including fees and costs associated with the Department of Labor's investigation into transactions undertaken by Street in his capacity as trustee—fees and costs that are also the subject of this action. *Id.* at ¶ 13. On February 2, 2007, Street's advancement and indemnification case was removed to the United States District Court for the District of Delaware and is currently pending on Street's motion for remand.

On February 2, 2007, after substantial investigation into Street's conduct while trustee, the Successor Trustee initiated an adversary proceeding (the "Adversary Proceeding") in the Bankruptcy Court to redress the serious damage Street wrought on the beneficiaries of the Trust; the Successor Trustee filed an Amended Complaint on April 5, 2007. See D.I. 11 Ex. G. The Adversary Proceeding, which is still proceeding in the Bankruptcy Court, seeks relief based on Street's multiple breaches of fiduciary duty, breaches of contract, fraud and conversion. See generally id. The complaint in the Adversary Proceeding alleges that Street utterly failed to fulfill his responsibility to efficiently and expeditiously liquidate the assets of the Trust for the benefit of roughly 4,100 creditors of the Fruehauf Trailer Corporation, and thereby fulfill the purpose and intent of the Plan. Instead, over his seven-year tenure as trustee, Street routinely abused his position as trustee, transferring millions of dollars in Trust assets as a means to protect his interests and enrich himself. Id. at ¶¶ 1-163.

On April 16, 2007, Street brought a motion to dismiss the Adversary Proceeding claiming that the Bankruptcy Court lacked subject-matter jurisdiction because the claims asserted against him were state law claims based on post-confirmation conduct. In denying

Street's motion to dismiss, the Bankruptcy Court held that Street's alleged misconduct occurred in the course of his duties as the central figure in the consummation of the Plan and administration of the estate of the Liquidating Trust and, therefore, the Bankruptcy Court unquestionably had subject matter jurisdiction. *In re Freuhauf*, 2007 WL 1805078, \*6 (Bankr. D. Del., June 22, 2007). Shortly thereafter, Street filed his answer and asserted a counterclaim in the Adversary Proceeding seeking indemnification for, *inter alia*, his costs and expenses incurred in connection with the Successor Trustee's investigation of Street's conduct and Street's defense of the Adversary Proceeding. *See* D.I. 11 Ex. H at 29-30.

Less than three weeks after the Bankruptcy Court denied his motion to dismiss and ten days after he filed his counterclaim, Street filed this action in the Superior Court of the State of California for the County of Orange. In this action, Street seeks "general damages in an amount to be proven at trial" as a result of the fact that the Trust's insurer has, to date, refused to provide coverage in relation to a Department of Labor subpoena to Street. Street alleges that this refusal is somehow the result of the Successor Trustee Daniel Harrow's communications with the insurer.

# <u>ARGUMENT</u>

# I. ABSTENTION UNDER 1334(c)(2) DOES NOT APPLY IN REMOVAL CASES.

Under 28 U.S.C. § 1334(c)(2) a federal court must abstain if: 1) a party has timely moved for abstention, 2) the proceeding is based upon a state law claim or cause of action, 3) the claim or cause of action is related to a case under Title 11 but is not a proceeding arising under or arising in a Title 11 case (i.e., it is not a core proceeding), 4) no other basis

for federal jurisdiction exists, 5) an action is commenced in state court, and 6) the matter can be timely adjudicated in a state forum.

In his Motion, Street contends that "under 28[]USC 1334(c)(2) there is no removal jurisdiction<sup>1</sup>[] and this Court must, thereforer [sic], abstain from exercising jurisdiction over this matter and remanded [sic] the action to state court." Street Memo. at 5. Street's contention is contradicted by controlling Ninth Circuit precedent, which Street fails to mention.

In the Ninth Circuit, it is well established that "the abstention principles of § 1334 do not apply in removal cases." *McDowell Welding & Pipefitting, Inc. v. U.S. Gypsum Co.*, 285 B.R. 460, 475 (D. Or. 2002) (citing *Security Farms v. International Broth. of Teamsters*, 124 F.3d 999, 1009-10 (9th Cir. 1997). The reason is simple. "When a case has been removed to federal court, the state case ceases to exist and [abstention under] § 1334 is no longer applicable." *Id.* "The appropriate standard to apply in removal cases, therefore, is the equitable remand standard of § 1452(b)." *Id.* Other than a vague reference to 28 U.S.C. § 1452(b), on page 5 of his Motion, Street makes no argument that this Court could or should exercise its discretionary power under 1452(b) to abstain from hearing this matter on equitable grounds.<sup>2</sup>

<sup>&</sup>lt;sup>1</sup> Of course, Street misspeaks when he argues that "under 28[ ]USC 1334(c)(2) there is no removal jurisdiction." Section 1334(c)(2) relates solely to circumstances under which a federal court must abstain from hearing a particular matter and has no bearing on whether a federal court has jurisdiction.

<sup>&</sup>lt;sup>2</sup> Clearly, under the facts set forth at pages 2-5, *supra*, the equities as well as the practicalities in this matter dictate that it be tried, if at all, in the Bankruptcy Court for the District of Delaware.

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Accordingly, the only issue raised by the remand motion is whether this Court possesses original jurisdiction over this matter. *See* 28 U.S.C. § 1441. For the reasons set forth below, Street's action (if any action is stated) is a core proceeding within the exclusive jurisdiction of the Bankruptcy Court or, at a minimum, is "related to" the Bankruptcy Case. This Court therefore possesses original jurisdiction under 28 U.S.C. § 1334(b).

# II. THIS COURT HAS SUBJECT MATTER JURISDICTION.

Federal subject matter jurisdiction over bankruptcy cases and proceedings emanates from 28 U.S.C. § 1334. Section 1334(b) provides that the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." Thus, bankruptcy court jurisdiction potentially extends to four types of title 11 matters: (1) cases under title 11; (2) proceeding arising under title 11; (3) proceedings arising in a case under title 11; and (4) proceedings related to a case under title 11. *In re Pegasus Gold Corp.*, 394 F.3d 1189, 1193 (9th Cir. 2005). A proceeding fitting within any of these categories is within the federal court's jurisdiction. However, since the fourth category is the broadest, a court need only determine whether a matter is at least related to the bankruptcy. *In re Resorts Intern.*, 372 F.3d 154, 163 (3rd Cir. 2004) (adopted in *In re Pegasus Gold Corp.*, 394 F.3d at 1194).

# A. THIS MATTER IS A CORE PROCEEDING WITHIN THE EXCLUSIVE JURISDICTION OF THE BANKRUPTCY COURT.

Proceedings "arising in a case under title 11" are referred to as core proceedings. See 1 Collier on Bankruptcy, P3.02[2], at 3-35 (15th ed. 2003). Congress vested bankruptcy courts with full and exclusive adjudicative power with regard to "core" proceedings. See 28 U.S.C. §§ 1334 and 157(a). A proceeding is core if it falls within the non-exhaustive list

In his Complaint, Street alleges, inter alia, that:

 From approximately July 1996 to the end of the end of August, 2005,<sup>3</sup> Plaintiff served as the Trustee of the End of the Road Trust. Compl. at ¶ 4.

in 28 U.S.C. § 157(b) or by its nature could arise only in the context of a bankruptcy case. In

• Plaintiff as Trustee of End of the Road Trust, was entitled to [insurance] coverage, including, but not limited to, a defense against liability for all actions taken as Trustee for the Trust. Id. at ¶ 5. (Emphasis added).

• On or about August 19, 2005, Plaintiff, was served with a subpoena by the United State Department of Labor *in his capacity as the Trustee* for the Trust. *Id* at ¶ 6. (Emphasis added).

• On or about August 19, 2006 [sic], pursuant to his voluntary resignation as Trustee was replaced as Trustee of the End of the Road Trust by Defendant, Daniel Harrow. Id. at ¶ 7. (Emphasis added).

• Pursuant to the terms and conditions of the policy of fiduciary liability insurance [obtained by the Trust], Plaintiff tendered the defense of the United States Department of Labor to Defendant, Daniel Harrow for processing *pursuant to his duties as the new Trustee for the Trust. Id.* at ¶ 7. (Emphasis added).

• Plaintiff has defended, and continues to defend, the subpoena and subsequent actions of the United States Department of Labor as they relate to Plaintiff's tenure as Trustee of the End of the Road Trust without the assistance mandated by the policy of insurance. Id. at ¶ 9. (Emphasis added).

• The correspondence goes on to state that Mr. Harrow, as the Trustee, "may have made additional misrepresentation relating to the nature of the Trust's business." *Id.* at ¶10. (Emphasis added).

<sup>&</sup>lt;sup>3</sup> Street actually began this tenure as trustee on October 27, 1998, and was removed pursuant to Bankruptcy Court Order on August 1, 2005. *See* Trust Agreement at 1 and Consent Agreement at 1.

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Although far from clear, Street appears to allege that (1) in his capacity as trustee,<sup>4</sup> the Successor Trustee owed Street a duty to disclose facts to the insurer regarding governmental investigations into Street's conduct while trustee and (2) by either failing to disclose those facts or making some false statement to the insurer, the Successor Trustee has deprived Street of a right to insurance coverage he retains by virtue of his status as former trustee. Street contends that this Court lacks subject matter jurisdiction over this matter because Street's causes of action "involve actions committed outside of the bankruptcy proceedings" and the right involved "is one that could exist outside of bankruptcy." Street's Memo. at 4 and 6. Street's contentions contradict the allegations of his Complaint and are meritless.

1. THE DUTIES STREET SEEKS TO IMPOSE ON THE SUCCESSOR TRUSTEE ARISE, IF AT ALL, OUT OF THE BANKRUPTCY PLAN AND TRUST AGREEMENT.

The Bankruptcy Plan centered upon and was to be implemented through the Liquidating Trust. In his administration of this Trust, the Successor Trustee is obligated to "take such actions as shall be necessary or advisable to preserve, maintain, and protect the Trust Estate." Trust Agreement at § 7.1.2. In fulfilling his duties to the beneficiaries, the Successor Trustee is afforded broad discretion, including the discretion to purchase and maintain such insurance as the Trustee deems reasonable, necessary, or appropriate to protect the Trust Estate. *Id.* at § 7.1.1. In his capacity as trustee, the Successor Trustee acquired

<sup>&</sup>lt;sup>4</sup> Despite a possible suggestion in his brief to the contrary (*see* Street's Memo. at 6 ("[p]laintiff's causes of action against Daniel Harrow are alleged against him as an individual")), Street's Complaint does not allege and, within the broadest possible bounds of Rule 11, could not allege that Daniel Harrow owes him a duty in Mr. Harrow's personal capacity, unrelated to his status as Successor Trustee.

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fiduciary liability insurance to fulfill his duty to the beneficiaries "to preserve, maintain, and protect the Trust Estate." *Id.* at § 7.1.2.

In alleging that the Successor Trustee engaged in misconduct in acquiring fiduciary liability insurance, Street directly challenges the Successor Trustee's performance of his duties under the Trust Agreement and the Plan<sup>5</sup>. Matters calling into question the Successor Trustee's performance of his duties under the Plan and Trust Agreement, as Street seeks to do by his Complaint, are core proceedings within the exclusive jurisdiction of the bankruptcy court. In re Birting Fisheries, Inc., 300 B.R. 489, 499 (9th Cir. B.A.P. 2003) (holding postconfirmation proceeding's involving bankruptcy's court's enforcement of its own orders are core proceedings); In re Southmark Corp., 163 F.3d 925 (5th Cir. 1999) (holding "[a] sine qua non in restructuring the debtor-creditor relationship is the court's ability to police the fiduciaries"); In re Coral Petroleum, Inc., 249 B.R. 721, 728 (Bankr. S.D. Tex. 2000) (holding bankruptcy court had jurisdiction to determine whether the trustee of the liquidating trust fulfilled his duties under the trust agreement).

<sup>&</sup>lt;sup>5</sup> Of course, Street's suggestion that he has standing to make such a challenge is misguided because the Successor Trustee's sole duties under the Trust Agreement are to and for the benefit of the beneficiaries, not Street. See Trust Agreement at § 7.1.2 (stating the duty of the trustee is "[t]o take such actions as shall be necessary or advisable to preserve, maintain, and protect the Trust Estate for the Beneficial Interestholders' benefit consistent with the purposes of the Liquidating Trust.") (emphasis added). Neither the Trust Agreement nor the Plan—the only two sources from which non-contractual duties of the Successor Trustee could arise—impose a duty upon the Successor Trustee for the benefit of a former trustee; and the Successor Trustee has not made contractual commitments to Street.

## 2. STREET'S ALLEGED RIGHT ALSO ARISES, IF AT ALL, OUT OF THE PLAN AND TRUST AGREEMENT.

The purported right that is the foundation for every claim Street asserts is a right that arises, if at all, solely out of his status as the former trustee of a liquidating trust that was the sum and substance of the Plan. Street confirms this fact by his own allegation that "[p]laintiff as Trustee of End of the Road Trust, was entitled to coverage." It is in Street's capacity as trustee, and in that capacity alone, that the fiduciary liability insurance allegedly provided Street "a defense against liability for all actions taken as Trustee for the Trust." *Id.* The deprivation of any right Street may have solely by virtue of his status as the former trustee of a Chapter 11 liquidating trust is a "core proceeding" because it could arise only in the context of a bankruptcy proceeding. *See also In re Gruntz*, 202 F.3d at 1082 (holding core proceedings include those by their nature could arise only in the context of a bankruptcy case).

## B. AT A MINIMUM THIS MATTER IS "RELATED TO" THE BANKRUPTCY PROCEEDING.

The Ninth Circuit has adopted the Third Circuit's test for determining whether a proceeding is "related to" a bankruptcy case. See In re Pegasus Gold Corp., 394 F.3d at 1193. After confirmation, bankruptcy courts continue to retain jurisdiction over matters that have "a close nexus to the bankruptcy plan or proceeding." Id. at 1194 (emphasis added). "Matters that affect the interpretation, implementation, consummation, execution, or administration of a confirmed plan or incorporated litigation trust agreement" have the requisite close nexus. Id. In proceedings involving continuing trusts, the nexus is significant. Id. Continuing trusts, including the specific Liquidating Trust at issue here, "by

their nature maintain a connection to the bankruptcy even after confirmation" because "they are constructed as instrumentalities of the execution of the plan. *In re Fruehauf*, 2007 WL 1805078 at \* 3 (Bankr. D. Del. June 22, 2007).

The Bankruptcy Court has already determined that matters involving Street's conduct

The Bankruptcy Court has already determined that matters involving Street's conduct as trustee are, at a minimum, "related to" the Bankruptcy Case. See In re Fruehauf, 2007 WL 1805078 at \* 9. As the Bankruptcy Court stated, allegations that Street engaged in misconduct while fulfilling his duties as trustee are "closely tied to the execution and administration of the Plan and Liquidating Trust Agreement so that there is clearly a sufficiently close nexus between his proceeding and the Fruehauf bankruptcy case to warrant the exercise of post-confirmation 'related to' jurisdiction" Id. (emphasis added). This matter is no different simply because it involves allegations of misconduct against the Successor Trustee. Like Street before him, the Successor Trustee is "the central figure in the consummation of the Plan and administration of the estate assets." Id. at 6. Street's allegations that the Successor Trustee engaged in misconduct in the performance of his duties under the Trust Agreement and Plan are likewise "related to" the Bankruptcy Case. Id.; In re Pegasus Gold Corp., 394 F.3d at 1193.

**CONCLUSION** For the foregoing reasons, the Successor Trustee respectfully request that this Honorable Court deny Street Motion for Remand in all respects. Dated: AUGUST 27, 2007 Respectfully submitted, BLAKELEY & BLAKELEY LLP -and-Robert T. Kugler (MN #194116) Robert L. DeMay (MN# 22081) Sarah E. Doerr (MN# 338679) Jacob B. Sellers (MN #348879) ATTORNEYS FOR PLAINTIFF DANIEL W. HARROW 

#### STATE OF CALIFORNIA, COUNTY OF ORANGE

The undersigned certifies and declares as follows:

I am employed in the City of Newport Beach and County of Orange, in the State of California. I am over the age of 18 and not a party to the within action. I am employed by Blakeley & Blakeley LLP, whose business address is 1000 Quail Street, Suite 200, Newport Beach, California 92660.

On August 27, 2007, I served the forgoing document described as:

# DEFENDANT DANIEL HARROW'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION TO REMAND

on the interested parties in this action [X] by placing [] the original [X] a true copy thereof enclosed in sealed envelopes addressed as follows:

#### SEE ATTACHED SERVICE LIST

#### [X] BY FEDERAL EXPRESS

[X] I deposited such envelope in a Federal Express drop box or other facility maintained by Federal Express at Newport Beach, California. The envelope was mailed with postage thereon fully prepaid.

[X] I am "readily familiar" with the firm's practice of collecting and processing correspondence for overnight mailing. Under that practice the envelope would be deposited with Federal Express on that same day with postage thereon fully prepaid at Newport Beach, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit of mailing in affidavit.

[X] I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed on **August 27, 2007**, at Newport Beach, California.

Shirley Chen

### **SERVICE LIST**

### **COUNSEL FOR PLAINTIFF**

Phillip B. Greer, Esq.
LAW OFFICES OF PHILLIP B. GREER
1280 Bison Road B9-531
Newport Beach, CA 92660

#### UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA SOUTHERN DIVISION

#### CIVIL MINUTES - GENERAL

Case No.: SA CV 07-829 AHS (RZx)

Date: September 18, 2007

Title:

Chriss Street v. Daniel Harrow, et al.

PRESENT: HON. ALICEMARIE H. STOTLER, CHIEF U.S. DISTRICT JUDGE

Ellen Matheson Deputy Clerk

Not Present Court Reporter

ATTORNEYS PRESENT: None

PROCEEDINGS:

(IN CHAMBERS) ORDER SUBMITTING (1) DEFENDANT'S MOTION TO TRANSFER VENUE (2) PLAINTIFF'S MOTION TO

REMAND

On August 3, 2007, plaintiff filed a motion to remand this case to the Superior Court of California, County of Orange. On August 7, 2007, defendant filed a motion to transfer venue to the United States District Court for the District of Delaware. The matter is set for hearing on the Court's September 24, 2007 calendar.

The Court finds the matter appropriate for submission on the papers without oral argument. <u>See</u> Local Rule 7-15 (stating that the Court may dispense with oral argument on any matter unless otherwise required); Fed. R. Civ. P. 78. The matter is, therefore, removed from the Court's September 24, 2007 calendar.

The Clerk shall serve this minute order on counsel for all parties in this action.

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#### UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA SOUTHERN DIVISION

<u>CIVIL MINUTES - GENERAL</u>

Case No.: SA CV 07-829 AHS(RZx) Date: October 31, 2007

Title: Chriss Street v. Daniel Harrow, et al.

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PRESENT: HON. ALICEMARIE H. STOTLER, CHIEF U.S. DISTRICT JUDGE

<u>Ellen Matheson</u>
Deputy Clerk

Not Present
Court Reporter

ATTORNEYS PRESENT: None present

PROCEEDINGS: (IN CHAMBERS) ORDER CONTINUING DATE FOR FILING OF

RULE 26(f) REPORT FROM NOVEMBER 5, 2007 TO

DECEMBER 10, 2007

On August 22, 2007, the Court issued an Order requiring the parties to file a Rule 26(f) Report no later than November 5, 2007.

On August 3, 2007, plaintiff filed a Motion to Remand. On August 7, 2007, defendant filed a Motion to Transfer Venue. On August 27, 2007, defendant filed opposition to plaintiff's Motion to Remand. On September 18, 2007, the Court took the motions under submission without hearing.

In light of the pending motions, the Court orders the deadline for filing of the Rule 26(f) Report continued from November 5, 2007 to December 10, 2007.

The clerk shall serve this minute order on counsel for all parties in this action.

Case 1:07-cv-00723-A4B-RZDocument 26:26 Fled 124

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CLERK, U.S. DISTRICT COURT **NOV 2** 8 2007 AL DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT

#### CENTRAL DISTRICT OF CALIFORNIA

#### SOUTHERN DIVISION

11 CHRISS STREET, SA CV 07-829 AHS (RZx) 12 Plaintiff, ORDER (1) GRANTING 13 DEFENDANT'S MOTION TO TRANSFER VENUE AND (2) v. 14 DENYING PLAINTIFF'S MOTION TO REMAND 15 DANIEL HARROW, et al., Defendants.

I.

#### PROCEDURAL BACKGROUND

Plaintiff Chriss Street ("plaintiff") filed the complaint in this action on July 12, 2007, in Orange County Superior Court. On July 19, 2007, defendant Daniel Harrow ("defendant") removed the case to district court. On August 3, 2007, plaintiff filed a motion to remand the case to Orange County Superior Court. On August 7, 2007, defendant filed a motion to transfer venue to United States District Court for the District of Delaware. August 27, 2007, defendant filed opposition to plaintiff's motion

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to remand. Plaintiff filed no opposition to defendant's motion to transfer venue. On September 18, 2007, the Court took the matter under submission.

II.

#### SUMMARY OF COMPLAINT

Plaintiff served as trustee of the End of the Road Trust ("EORT") from October 27, 1998, until August 1, 2005, when he was succeeded by defendant. (Complaint "Compl." ¶ 4; Declaration of Jacob B. Sellers ("Sellers Decl."), Ex. A, at p. 1; Ex. B, at p. The purpose of the EORT is to liquidate the assets of Fruehauf Trailer Corporation and certain of its subsidiaries (collectively, "debtors"), which filed for Chapter 11 bankruptcy proceedings before the United States Bankruptcy Court for the District of Delaware. 1 (Sellers Decl., Ex. C.) The Liquidating Trust Agreement ("Trust Agreement"), which created the EORT, was adopted pursuant to the debtors' Amended Joint Plan of Reorganization ("Reorganization Plan") confirmed by the Bankruptcy Court on September 17, 1998. (Sellers Decl., Exs. A, B, C.) On August 19, 2005, plaintiff was served with a subpoena by the United States Department of Labor ("DOL") in his capacity as trustee of the EORT. (Compl. ¶ 6.)

Pursuant to a fiduciary liability insurance policy which allegedly covered him from approximately July 17, 2005, to July 17, 2006, plaintiff tendered the defense of the subpoena to defendant, in his capacity as successor trustee, for processing. (Id.  $\P$  5.)

The case is U.S. Bankruptcy Court (Dist. Delaware) Case No. 96-1563 (PJW).

Defendant subsequently informed plaintiff the trust's insurance provider, Arch Specialty Insurance Company ("insurance provider"), had declined to extend coverage for the DOL investigation and plaintiff would have to personally defend the subpoena. (Id. ¶¶ 8, 9.) Plaintiff claims he was unaware at the time of the basis for denial or of any information exchanged between the insurance provider and defendant while the decision regarding coverage was pending. (Id. ¶ 8.)

In March 2007, plaintiff discovered correspondence between the insurance provider and defendant's counsel, which states certain responses provided by defendant to inquiries by the insurance provider were "'false when made'" and contained "'misrepresentations.'" (Id. ¶ 10 (quoting Ex. A, p. 6, ¶¶ 1, 2)). Plaintiff claims he was unlawfully denied insurance coverage for the DOL investigation on the basis of these "false" statements and "misrepresentations" by defendant. (Id.) The DOL investigation remains active. (Id. ¶ 9.) Plaintiff alleges claims for breach of contract, fraud, intentional interference with economic relations, negligent interference with economic relations, and conspiracy.

III.

#### SUMMARY OF PARTIES' CONTENTIONS

#### A. Defendant's Motion to Transfer Venue

Defendant moves to transfer this action to the United States District Court for the District of Delaware under either 28 U.S.C. § 1406(a) or § 1404(a). Under § 1406(a), when a district court receives a case "laying venue in the wrong division or district," it can either dismiss it, or, if in the interest of justice, transfer it to "any district or division in which it could

have been brought." Section 1404(a) allows a district court to transfer a case "[f]or the convenience of the parties and witnesses, in the interest of justice" to "any other district or division where it might have been brought."

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Defendant contends the present action is a "core" bankruptcy proceeding, and thus, under the exclusive jurisdiction of the Bankruptcy Court. 28 U.S.C. § 1334(a)-(b). Core bankruptcy proceedings are those listed under 28 U.S.C. § 157(b)(2) or those which by their nature could only arise in the context of a bankruptcy case. <u>In re Gruntz</u>, 202 F.3d 1074, 1081 (9th Cir. 2000). Matters calling into question the performance of a trustee under a confirmed plan and Trust Agreement are considered core bankruptcy proceedings by the courts. In re Birting Fisheries, <u>Inc.</u>, 300 B.R. 489, 499 (B.A.P. 9th Cir. 2003). Defendant asserts this is the case here. Plaintiff's complaint references the parties in their capacities as trustees in articulating the claims. (Compl.  $\P\P$  4, 5, 6, 7, 9, 10.) Plaintiff's entitlement to fiduciary liability insurance coverage consideration rests exclusively on his status as former trustee. Any duties owed by defendant to plaintiff in connection with insurance coverage similarly arise out of his status as successor trustee. Agreement, which created the EORT, specifically refers to the purchase and maintenance of insurance as administrative duties of the trustee. (Sellers Decl., Ex. C, § 7.1.1.) Plaintiff's challenge to defendant's performance of these duties directly concerns the "administration of the estate," which is among the listed core bankruptcy proceedings under § 157(b)(2).

At minimum, defendant argues, this case is "related to"

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bankruptcy proceedings. § 1334(b). Bankruptcy courts retain jurisdiction after confirmation over matters having "a close nexus to the bankruptcy plan or proceeding." In re Peqasus Gold Corp., 394 F.3d 1189, 1192 (9th Cir. 2005). This is particularly true when, as here, a continuing trust is involved, because they are "constructed as instrumentalities of the execution of the plan." In re Fruehauf Trailer Corp., 369 B.R. 817, 822 (Bankr. D. Del. 2007) (citing <u>In re Resorts Intern., Inc.</u>, 372 F.3d 154, 167 (3rd Cir. 2004)). <u>In re Freuhauf</u> is an adversary proceeding initiated by defendant in this case currently pending before the Delaware Bankruptcy Court. <u>Id.</u> It alleges plaintiff engaged in various forms of misconduct during his tenure as trustee. Id. at 828. The Bankruptcy Court found the allegations against plaintiff here were "related to" the bankruptcy proceedings because they were "closely tied to the execution and administration of the Plan and Liquidating Trust Agreement." Id. at 827. The Court should hold this matter is no different, since plaintiff is alleging misconduct by defendant in his capacity as successor trustee.

Defendant argues transferring this "related to" case to the Delaware District Court under § 1404(a) serves the convenience of the parties and the interests of justice. Plaintiff has availed himself of the Delaware courts by filing a petition for advancement and indemnification in the Court of Chancery, which includes costs associated with the DOL investigation. (Sellers Decl., Ex. F, p. 3.) This action has been removed to the Delaware District Court, where defendant expects it will be transferred to the Bankruptcy Court. Plaintiff has also filed a counterclaim in the adversary proceedings initiated against him by defendant in

the Delaware Bankruptcy Court. (Sellers Decl., Ex. H, p. 29.) Transferring this matter to the Delaware District Court would be convenient to the parties since they have litigation pending in that forum. It would also serve the interests of judicial economy, since that court could in turn transfer the matter to the Bankruptcy Court, which has continuing and exclusive jurisdiction over matters concerning the trust at issue.

#### Plaintiff's Motion to Remand

Plaintiff moves to remand to Orange County Superior Court under 28 U.S.C. § 1334(c)(2), which provides:

> Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court judge shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

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Plaintiff contends the district court is barred from considering his case because the claims at issue are not core bankruptcy proceedings "arising under" or "arising in a case under title 11." § 1334(c)(2). A core proceeding case would not exist but for the existence of the bankruptcy proceedings. Doshea Dean, et al. v. American General Finance, 191 B.R. 463, 468 (Bankr. M.D. Ala. 1996). Since this case has nothing to do with the relationship between debtors and creditors and is entirely limited to the legality under California law of the actions of defendant as an individual, it is not a core bankruptcy proceeding. The "nexus" 28 between the instant action and the bankruptcy proceeding is not

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one that "could directly affect the bankrupt estate" by "alter[ing] the debtors' rights, liabilities, options, freedom of action, or the administration of the bankrupt estate." <u>Doshea</u>

<u>Dean</u>, 191 B.R. at 469. The district court lacks subject matter jurisdiction in light of the mandatory abstention under §

1334(c)(2) because there is otherwise no federal question and the parties lack diversity.

Alternatively, plaintiff argues the Court should exercise discretionary abstention or remand on equitable grounds. § 1334(c)(1) (permitting courts to abstain from actions "in the interest of justice, or in the interest of comity with State courts or respect for State law"); 28 U.S.C. § 1452(b) ("The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground."). Since the instant action is based on California law, plaintiff contends the Court should abstain to permit the state court to resolve state law matters. Remand would serve judicial economy by having the courts most familiar with California law adjudicate the case.

Finally, plaintiff requests the Court grant costs and attorney fees. 28 U.S.C. § 1447(c) ("An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of removal.").

#### C. Defendant's Opposition to Motion to Remand

Defendant contends plaintiff's § 1334(c)(2) mandatory abstention argument is without merit, since the provisions of the section are inapplicable once a case is removed to federal court.

McDowell Welding & Pipefitting, Inc. v. U.S. Gypsum Co., 285 B.R.

460, 475 (D. Or. 2002) (citing Security Farms v. Int't Broth. Of

1 Teamsters, 123 F.3d 999, 1009-10 (9th Cir. 1997)). Section 2 1452(b), which allows district courts to remand bankruptcy-related 3 claims based on "any equitable ground," not § 1334(c)(2), is the 4 appropriate section to consider after a case has been removed to 5 district court. Id. Plaintiff makes brief reference to § 6 1452(b), but he does not argue on what equitable grounds the 7 district court should remand. As such, the only issue raised by plaintiff's remand motion is whether the district court has 8 9 original jurisdiction over this matter. See 28 U.S.C. § 1441. 10 Defendant argues the Court has jurisdiction under § 11 1334(b), which states "district courts shall have original but not 12 exclusive jurisdiction of all civil proceedings arising under 13 title 11, or arising in or related to cases under title 11." A 14 court need only determine whether the matter before it is at 15 minimum "related to" a bankruptcy case, since it is the broadest 16 category under § 1334(b). Pegasus Gold Corp., 394 F.3d at 1194. 17 For the reasons set forth in his motion to dismiss, defendant 18 maintains this matter is a core bankruptcy proceeding, or at 19 minimum, is related to the proceedings currently before the 20 Bankruptcy Court. Plaintiff's motion to remand should thus be 21 denied. 22 // 23 // // 24 // 25 // 26 27 // 28 //

IV.

#### **DISCUSSION**

#### A. Defendant's Motion to Transfer Venue

Defendant moves for transfer under either 28 U.S.C. § 1406(a) or 28 U.S.C. § 1404(a). The Court finds § 1404(a) the more appropriate vehicle for consideration of this motion.<sup>2</sup>

#### 1. Legal Standard

A change of venue for convenience is governed by 28 U.S.C. § 1404(a), which provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." "[T]he district court has discretion to 'adjudicate motions for transfer according to an individualized, case-by-case consideration of convenience and fairness.'" Jones v. GNC Franchising, Inc., 211 F.3d 495, 498 (9th Cir. 2000) (quoting Stewart Organization, Inc. v. Ricoh Corp., 487 U.S. 22, 23 (1988)). In conducting its analysis, a court may consider various factors in deciding whether to grant a motion to transfer, including:

(1) [T]he location where the relevant agreements were negotiated and executed, (2) the state that is most familiar with the governing law, (3) the plaintiff's choice of forum, (4) the respective parties' contacts

<sup>&</sup>lt;sup>2</sup>A party may bring a § 1406(a) motion where venue is laid in a "wrong" district. <u>See Van Dusen v. Barrack</u>, 376 U.S. 612, 634 (1964) ("Although both sections were broadly designed to allow transfer instead of dismissal, Section 1406(a) provides for transfer from forum in which venue is wrongly or improperly laid, whereas, in contrast, Section 1404(a) operates on the premise that the plaintiff has properly exercised his venue privilege."). Here, defendant properly removed the action to district court under 28 U.S.C. 1441(b).

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with the forum, (5) the contacts relating to the plaintiff's cause of action in the chosen forum, (6) the differences in the costs of litigation in the two forums, (7) the availability of compulsory process to compel attendance of unwilling witnesses, and (8) the ease of access to sources of proof. Additionally, the presence of a forum selection clause is a "significant factor" in the court's § 1404(a) analysis.

Jones, 211 F.3d at 499 (quoting Stewart Org. v. Ricoh Corp., 487 U.S. 22, 29-31. Defendant bears the burden of showing the alternative venue would be more convenient. Commodity Futures

Trading Comm'n v. Savage, 611 F.2d 270, 279 (9th Cir. 1979).

Under § 1404(a), the transferor court must additionally determine whether the action initially could have been commenced in the prospective transferee court. Hatch v. Reliance Ins. Co., 758

F.2d 409, 414 (9th Cir. 1985).

# The Court Grants Defendant's Motion to Transfer Venue Under 28 U.S.C. § 1404(a)

Pursuant to § 1404(a), the Court should examine three main considerations: the convenience of parties and witnesses; the interests of justice; and whether the action could have been brought in the district to which transfer is sought.

#### a. Convenience of the Parties and Witnesses

#### i. Parties

### Choice of Forum and Familiarity with Governing Law

Transfer is sought to the Delaware District Court, but California is plaintiff's "choice of forum." <u>Jones</u>, 211 F.3d at 499. Plaintiff's choice of forum is to be given deference, but it is not dispositive and is to be balanced with other relevant

factors. <u>Decker Coal Co. v. Commonwealth Edison Co.</u>, 805 U.S. 834, 843 (1986). Courts, for example, should also consider the forum "most familiar with the governing law." <u>Jones</u>, 211 F.3d at 499. Here, because the parties have multiple related proceedings in Delaware, transfer of the matter to the district court there for resolution is appropriate under § 1404(a).

Defendant contends the Bankruptcy Court has exclusive jurisdiction over this matter because it is a "core" bankruptcy proceeding. The statutory grant of bankruptcy jurisdiction in the federal courts extends to "all civil proceedings arising under title 11, or arising in or related to a case under title 11." 28 U.S.C. § 1334. Matters that "arise under" or "arise in" a case under title 11 are considered "core" matters, whereas those "related to" cases under title 11 are "noncore." Gruntz, 202 F.3d at 1081; see also 28 U.S.C. § 157(b)(2) (listing examples of core bankruptcy proceedings). The distinction between core and noncore matters is chiefly important in identifying those matters for which bankruptcy judges can enter final judgments and those where they can only propose findings of fact and conclusions of law to the district court judge. Gruntz, 202 F.3d at 1081.

Determining the likelihood that the present matter is related to the Delaware bankruptcy case informs the transfer analysis because it is convenient to the parties to have substantially related matters adjudicated in the same forum. See A.J. Indus., Inc. v. U.S. Dist. Court for the Central Dist. of Calif., 503 F.2d 384, 389 (1974) ("[E] ven the pendency of an action in another district is important because of the positive effects it might have in possible consolidation of discovery and

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convenience to witnesses and parties."). Having a court already substantially familiar with the bankruptcy Reorganization Plan and agreements rule on the extent of their applicability and the nature of the rights contained therein also benefits the parties' convenience interests.

Although the causes of action in the complaint here are California law-based, the crux of the claims appears to relate to entitlements and responsibilities of the parties under the Reorganization Plan and related agreements approved by the Bankruptcy Court. Courts have recognized "that in cases involving continuing trusts (such as litigation trusts, or as here, a liquidating trust), trusts 'by their nature maintain a connection to the bankruptcy court even after the plan has been confirmed.'" Pegasus Gold, 394 F.3d at 1194 (quoting Resorts Intern., 372 F.3d In <u>Pegasus Gold</u>, the "majority of the claims asserted in the complaint [were] common state tort and contract claims involving post-confirmation conduct." Id. Nonetheless, the Court of Appeals for the Ninth Circuit held the lower court's determination that the claims were "related to" the bankruptcy proceedings was correct because the claims would "likely require the interpretation" of the bankruptcy plan and relevant agreements. Id.

This case bears similarities. The complaint alleges "[p]laintiff, as Trustee of End of the Road Trust, was entitled to coverage, including, but not limited to, a defense against liability for all actions taken as Trustee for the Trust."

(Compl. ¶ 5. (emphasis added)) Plaintiff claims he requested fiduciary liability insurance coverage from defendant pursuant to

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defendant's "duties as the new Trustee for the Trust." (Id.,  $\P$  8. Plaintiff further alleges defendant "had a duty (emphasis added)) and obligation to provide a defense . . . against the Department of Labor subpoena." (Id., ¶ 12.) The Trust Agreement, which created the trust in question, includes the purchase and maintenance of insurance among the trustee's "[m] anagement" duties. (Sellers Decl., Ex. C, § The Trust Agreement states that, "with respect to assets of the Trust estate," the trustee is directed "[i]f sufficient funds are available to purchase and maintain in existence, such insurance as the Trustee deems reasonable, necessary, or appropriate from time to time to protect the Liquidating Trust's, the Trustee's and the Beneficial Interestholder's [sic] interests in the Trust Estate." (<u>Id.</u>, §§ 7.1, 7.1.1.) The Trust Agreement's indemnification provision applies to "civil, criminal, administrative, or investigative" proceedings that may arise "by reason of the fact that [the person] is or was a Trustee." (Id., § 8.5.1. (emphasis added)) Accordingly, this matter appears to "aris[e] in" the bankruptcy proceedings that gave rise to the liquidating trust, or, at minimum, it is "related to" said proceedings. Though the "arising in" category is "less clear" than the "arising under" and "related to" categories, the cases in the "arising in" category are considered by courts "those that are not based on any right expressly created by title 11, but nevertheless, would have no existence outside of the bankruptcy." In re Harris Pine Mills, 44 F.3d 1431, 1435 (9th Cir. 1995). Both plaintiff and defendant

served as trustees of the EORT as a result of the Bankruptcy

Court-confirmed plan. (Sellers Decl., Ex. D.) But for the existence of the bankruptcy proceedings regarding this plan, neither party would have been a trustee and the question of trustee fiduciary liability insurance coverage would not exist.

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In deciding between proper forums, <u>Jones</u> also instructs that forum selection clauses should be accorded "significant" consideration. 211 F.2d at 499. Though there is no contract directly between plaintiff and defendant with a clause agreeing to a forum for resolution of disputes between them, the Reorganization Plan and its related agreements contain provisions expressly indicating the Bankruptcy Court should retain jurisdiction over matters relating to the Reorganization Plan and agreements' interpretation. The Bankruptcy Court's September 17, 1998 confirmation order states, "Notwithstanding Confirmation of the Plan, this Court retains jurisdiction as is provided in Article 11 of the Plan." Id.,  $\P$  6(d). Article 11 of the Reorganization Plan, titled "Retention of Jurisdiction," in turn states the Bankruptcy Court shall retain jurisdiction to, inter alia, "[r]esolve any and all controversies, suits, or issues that may arise in connection with the consummation, interpretation, or enforcement of the Plan or any entity's obligations incurred in connection with the plan." Id., Ex. A, p. 23.

The Bankruptcy Court has previously invoked the Reorganization Plan's retention of jurisdiction article. In a related proceeding involving the same parties, the Bankruptcy Court addressed the provisions of Article 11 in considering a subject matter jurisdiction challenge. Fruehauf Trailer Corp., 369 B.R. at 827. In that case, plaintiff Harrow, in his role as

trustee, brought an action against defendant Street alleging breach of fiduciary duties and other misconduct during Street's tenure as trustee. <u>Id.</u> at 820.

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Because the claims involved Street's actions while trustee, the Bankruptcy Court concluded the "adversary proceeding is closely tied to the execution and administration of the Plan and the Liquidating Trust Agreement so that there is clearly a sufficiently close nexus between [the] proceeding and the Fruehauf bankruptcy case to warrant the exercise of post-confirmation 'related to' jurisdiction." Id. at 828. The court noted "Street was responsible for the formulation of the [Reorganization] Plan," including Article 11. Id. at 827. As such the court stated its "exercise of jurisdiction is not only warranted, but was explicitly agreed to by Street." Id. Though Article 11 cannot "artificially" create jurisdiction, the court stated the provision is still "proof of a close nexus between the claims and the bankruptcy case." Id. (quoting EXDS, Inc. v. CB Richard Ellis, Inc. (In re EXDS, Inc.), 352 B.R. 731, 735 (Bankr. D. Del. 2006)). The court concluded the "close nexus" between the cases made it, <u>Id.</u> at 828.<sup>3</sup> at minimum, "related to" the bankruptcy proceeding.

The Employment Agreement between the EORT and plaintiff, which was adopted pursuant to the Trust Agreement, also contains language supportive of Delaware as the preferred forum for adjudication of matters related to plaintiff's trusteeship. It

<sup>&</sup>lt;sup>3</sup> The Bankruptcy Court did not reach the question whether the matter was a core bankruptcy matter "arising under," or "arising in" a case under, Title 11. <u>Fruehauf Trailer Corp.</u>, 369 B.R. at 821 n.2.

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states, for example, that "[a]ny dispute or controversy arising under or in connection with this Agreement shall be settled exclusively by the Bankruptcy Court." (Declaration of Sarah E. Doerr ("Doerr Decl."), Ex. A, p.7.) The Employment Agreement further states: "The validity, interpretation, construction, and performance of this Agreement shall be governed by the laws of the State of Delaware without regard to its conflicts of law principals [sic]." (Id.)

The instant case involves the same Reorganization Plan and Trust Agreement at issue in Fruehauf Trailer Corp. court's decision in Fruehauf Trailer Corp finds support in the holdings of other courts. In the Ninth Circuit, courts have held that when a complaint contains "no substantive bankruptcy law issues," the "mere fact that a bankruptcy degree has issued" does not require "that any and all further proceedings be in the bankruptcy court." Birting Fisheries, 300 B.R. at 501 (quoting <u>Hinduja v. Arco Prods. Co.</u>, 102 F.3d 987, 989-90 (9th Cir. 1996). However, <u>Birting Fisheries</u> also limited the instances where bankruptcy-related proceedings are appropriately before state courts to those occasions "where jurisdiction has not been reserved," among other factors. Id. Though the instant case is now before the district court, <u>Birting Fisheries</u> is nonetheless instructive. Because the Reorganization plan and its related agreements - those under which plaintiff acquired the position which he now claims entitles him to insurance coverage - indicate the Delaware courts should be the locus for adjudicating matters related to said agreements, plaintiff's "choice of forum" is fairly accorded less weight. Jones, 211 F.3d at 499.

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In sum, the District Court for the Central District of California likely has more experience than the Delaware District Court in adjudicating California law claims generally, and plaintiff's original filing in state court indicates his choice of forum is California. However, in light of the significant interest in having the Delaware Bankruptcy Court decide actions likely arising in, but at minimum, related to, the bankruptcy proceedings involving these parties, this factor favors transfer to the District of Delaware.

## Contacts with Selected Forum and Location of Relevant Agreements

Both plaintiff and defendant have "contacts" with California, since they are residents of the state. <u>Jones</u>, 211 The EORT, to which they have both served as F.3d at 499. trustees, also has its principal offices located in California. ("Doerr Decl., Ex. A, p. 1.) The trust, however, was created under Delaware law to hold the former assets of Fruehauf Trailer Corporation, a Delaware corporation. (Sellers Decl., Ex. F, ¶ 2). The relevant "agreements" in this case include the Reorganization Plan and the Trust Agreement adopted pursuant to its terms. agreements were confirmed by the Delaware Bankruptcy Court, which, as evidenced by Article 11 of the Reorganization Plan, appears to have been chosen as the preferred forum for adjudication of related matters. (Sellers, Ex. A, p. 23.) Thus, while the parties are physically located in California, their role as trustees also indicates contacts with Delaware.

It is also noteworthy that, along with the bankruptcy proceeding that gave rise to the EORT, the parties presently are

involved in other legal proceedings in Delaware involving the Reorganization Plan and Trust Agreement. As mentioned above, defendant initiated an adversary proceeding against plaintiff alleging breach of fiduciary duties and other misconduct during his tenure as trustee. Fruehauf Trailer Corp., 369 B.R. at 820. Plaintiff has filed a counterclaim with his answer, seeking indemnification under the Trust Agreement for expenses associated with the litigation. (Sellers Decl., Ex. H, p. 29) Also, on January 9, 2007, plaintiff filed a petition for Advancement and Indemnification in the Delaware Court of Chancery, which also involves, in part, the DOL investigation at issue in the instant complaint. (Sellers Decl., Ex. F, ¶ 13.)

Not only did the relevant "agreements" emerge from the Delaware bankruptcy proceedings, plaintiff's availing himself of the proposed transferee district tends to show the forum is not inconvenient to him, despite the contacts he and the defendant have with California.

#### 3. Other Factors

The existence of pending legal proceedings involving the parties - including at least one entirely initiated by plaintiff, as described above - militates against a finding that the "differences in the costs of litigation in the two forums," "the availability of compulsory processes to compel attendance of unwilling witnesses," and the "the ease of access to sources of proof" disfavor transfer to the Delaware District Court. <u>Jones</u>, 211 F.3d at 499.

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ii. Witnesses

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Though the convenience of parties should is an important factor, the convenience of nonparty witnesses is often recognized as the most important consideration in deciding a § 1404(a) motion. Los Angeles Memorial Coliseum Comm'n v. Nat'l Football League, 89 F.R.D. 497, 501 (C.D. Cal. 1981); see also Saleh v. Titan Corp., 361 F. Supp. 2d 1152, 1160 (S.D. Cal. 2005). The Court should consider not merely the number and location of each party's witnesses, but also the materiality and importance of the witnesses' testimony. Saleh, 361 F. Supp. 2d at 1161.

Based on the facts in the complaint, this action chiefly involves communications between the insurance provider, plaintiff, defendant, and counsel for all parties. Aside from the insurance provider and its counsel, no other nonparty witnesses have been identified by the parties as potential sources of testimony. Since the statements on which plaintiff bases his claims appear in correspondence prepared by insurance provider's counsel and reflects decisions made by the insurance provider, their testimony interpreting the correspondence is likely to be both material and important. Courts, however, typically give little to no weight to inconvenience posed to counsel. See Fodor v. Berglas, 1994 WL 822477, \*8 (C.D. Cal. Dec. 27, 1994); <u>Burstein v. Applied</u> Extrusion Technologies, Inc., 829 F. Supp. 106, 112 (D. Del. The Court thus limits its nonparty witness inquiry to potential testimony on behalf of the insurance provider. Because the insurance provider, conducts business on a national scale, including Delaware, the inconvenience it may experience from transferring venue will likely be minimal. The parties, however,

have provided no evidence in this regard. In light of the absence of evidence of inconvenience to the insurance provider and the overwhelming interest in having this matter transferred to the forum where the Bankruptcy Court overseeing the Reorganization Plan is located and where the parties are presently litigating related matters, this factor does not militate against transfer to the Delaware District Court.

#### b. Interest of Justice

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The broad "interest of justice" factor of § 1404(a) is often regarded as encompassing, among other things, considerations of judicial economy and efficiency. See Stewart Organization, 487 U.S. at 30 (including "systemic integrity and fairness" in the 1404(a) "interest of justice" factor); cf. Ferens v. John Deere Co., 494 U.S. 516, 532 (1990) ("[T]o permit a situation in which two cases involving precisely the same issues are simultaneously pending in different District Courts leads to the wastefulness of time, energy and money that § 1404(a) was designed to prevent."). As discussed above, the present case appears to arise in, or at minimum, is related to, the Delaware Bankruptcy Court proceedings. It is in the interest of justice to transfer the matter to the district court empowered to refer the matter to the Bankruptcy Court, which is already substantially familiar with the parties and their respective duties and entitlements under the approved Reorganization Plan and Trust Agreement. As defendant asserts, retaining the matter in this Court risks creating inconsistent rulings on the duties and entitlements of the parties under the same Reorganization Plan and Trust Agreement.

# c. Whether Action Might Have Been Brought in Delaware District Court

brought' in a district, the court looks to whether the action could have been commenced in that district." Hatch, 758 F.2d at 414. Merely because a plaintiff "choos[es] not to" begin the action in the district does not mean the action could not have been brought in the district. Id. Plaintiff could have brought this claim in the District of Delaware pursuant to the provisions of 28 U.S.C. § 1334(b). As established above, the present action appears to "arise in" the Delaware bankruptcy proceeding.

Moreover, the retention of jurisdiction provisions in the Reorganization Plan and related agreements suggest the Bankruptcy Court would have exercised jurisdiction over plaintiff's claims had he brought them in that forum.

#### B. Plaintiff's Motion to Remand

#### 1. Legal Standard

A suit may be removed to federal court by the defendant if the federal court would have had original subject matter jurisdiction over that suit. 28 U.S.C. § 1441(a). A "cause of action arises under federal law only when the plaintiff's well pleaded complaint raises issues of federal law." Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63 (1987). A well pleaded complaint must establish "either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 27-28 (1983). Upon a motion to remand by

plaintiff, defendant bears the burden of establishing proper removal and federal jurisdiction. <u>Gaus v. Miles Inc.</u>, 980 F.2d 564, 566 (9th Cir. 1992). The removal statute is strictly construed against removal jurisdiction and any doubt is resolved in favor of remand. <u>Boggs v. Lewis</u>, 863 F.2d 662, 663 (9th Cir. 1988).

#### 2. Plaintiff's Motion to Remand is Denied

Despite plaintiff's argument to the contrary, defendant correctly asserts once a case is removed to federal court mandatory abstention under § 1334(c)(2) is no longer applicable.

Security Farms, 123 F.3d at 1009-10; see also In re Lazar, 237 F.3d 967, 981 (9th Cir. 2001). Under Ninth Circuit law, § 1334(c) "should be read in pari materia with section 1452(b) remand, so that § 1334(c) applies only in those cases in which there is a related proceeding that either permits abstention in the interest of comity, section 1334(c)(1), or that by legislative mandate, requires it, section 1334(c)(2)." Security Farms, 123 F.3d at 1010 (citations omitted). Once a case is removed, "no other related state proceeding thereafter exists." Lazar, 237 F.3d at 981.

The instant case is no different. Once defendant removed the case to district court on July 19, 2007, the state case ceased to exist. This principle applies both to § 1334(c)(1) and § 1334(c)(2). Lazar, 237 F.3d at 982. Thus, plaintiff's alternative argument requesting the Court exercise its discretionary authority to abstain under § 1334(c)(1) is similarly inapplicable.

In the interests of comity and in having California law

1 claims adjudicated by California courts, plaintiff lastly requests 2 the Court remand on equitable grounds under § 1452(b). 3 have held comity and the predominance of state law issues in a 4 case are among the equitable grounds a Court should consider under 5 § 1452(b). See Williams v. Shell Oil Co., 169 B.R. 684, 692-93 (S.D. Cal. 1994). As discussed above, however, the instant action 6 7 appears to be a core bankruptcy proceeding because it appears to "aris[e] in" or is related to a case under Chapter 11 in the 8 Delaware Bankruptcy Court. § 1334(c)(2). Though the causes of action in the complaint are based on state law, this case, as discussed above, will likely turn on the interpretation of the parties' entitlements and duties under the Reorganization Plan and Trust Agreement. (Sellers Decl., Exs. B, C.) Because the Delaware Bankruptcy Court, which could hear the case upon transfer to the Delaware District Court, is in the best position to interpret the duties of the trustees under the Reorganization Plan 17 and Trust Agreement, it is not offensive to the principles of comity to have that court, rather than the California court, consider the matter. In light of the Court's granting of defendant's motion to transfer venue and these considerations, plaintiff's motion to remand is denied. // // // // II28 //

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# Plaintiff's Request for Costs, Expenses, and Attorney Fees is Denied

Under 28 U.S.C. § 1447(c), "[a]n order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." Because the motion to remand is denied, plaintiff's request for costs, expenses, and attorney fees is likewise denied.

v.

#### CONCLUSION

For the foregoing reasons, the Court grants defendant's Motion to Transfer Venue to the United States District Court for the District of Delaware, and denies plaintiff's Motion to Remand.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the Clerk shall serve a copy of this Order on counsel for all parties in this action.

DATED: November 28, 2007.

ALICEMARIE H. STOTLER

ALICEMARIE H. STOTLER CHIEF U.S. DISTRICT JUDGE